Supreme Court, U.S.
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No. 94-142

In The

Supreme Court of the United States

October Term, 1994

ORVILLE AMBURGEY,

Plaintiff-Petitioner,

vs.

THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A. KATHE, City Attorney for the City of Costa Mesa, an individual; ALLAN ROEDER, City Manager for the City of Costa Mesa, an individual; MARY HORNBUCKLE, an individual; and DOES 1-100, inclusive,

Defendant-Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONER AMBURGEY HAS STANDING BEFORE THE U.S. SUPREME COURT AND HAS PRESENTED A JUSTICIABLE CASE OR CONTROVERSY UNDER FEDERAL LAW OR HAS, INSTEAD, INAPPROPRIATELY REQUESTED ADVISORY OPINIONS AND REVIEW OF NON-FEDERAL ISSUES ADEQUATELY DECIDED ON STATE LAW GROUNDS.

II. WHETHER THE CALIFORNIA COURTS CORRECTLY FOUND THAT COSTA MESA CITY ATTORNEY KATHE WAS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY PURSUANT TO FEDERAL LAW.

III. WHETHER THE CALIFORNIA COURT CORRECTLY FOUND THAT PETITIONER DID NOT PRESENT ANY RECOGNIZED CIVIL RIGHTS VIOLATION UNDER FEDERAL LAW.

IV. WHETHER THE CALIFORNIA COURTS CORRECTLY FOUND THAT THE COSTA MESA CITY MAYOR AND CITY MANAGER WERE ENTITLED TO ABSOLUTE LEGISLATIVE IMMUNITY UNDER FEDERAL LAW.

V. WHETHER THE ISSUE OF AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN PETITIONER AND THE COSTA MESA CITY ATTORNEY INAPPROPRIATELY PRESENTS A NON-FEDERAL ISSUE ADEQUATELY DECIDED ON INDEPENDENT STATE GROUNDS.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RESPONDENTS' BRIEF IN OPPOSITION..... 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE..... 2

1. Factual Background..... 2

2. Procedural Background 3

SUMMARY OF ARGUMENT..... 9

REASONS WHY THE WRIT SHOULD BE DENIED .. 11

I. PETITIONER LACKS STANDING BEFORE THIS COURT AND HAS NOT PRESENTED A JUSTICIABLE CASE OR CONTROVERSY UNDER FEDERAL LAW AND FURTHER INAPPROPRIATELY REQUESTS ADVISORY OPINIONS..... 11

II. THE CALIFORNIA COURTS CORRECTLY FOUND THAT CITY ATTORNEY KATHE WAS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY PURSUANT TO THE U.S. SUPREME COURT CASE OF *IMBLER V. PACHTMAN*..... 13

III. THE CALIFORNIA COURTS CORRECTLY FOUND THAT PETITIONER DID NOT PRESENT ANY RECOGNIZED CIVIL RIGHTS VIOLATION 17

IV. THE CALIFORNIA COURTS CORRECTLY FOUND THE CITY MAYOR AND CITY MANAGER WERE ENTITLED TO ABSOLUTE LEGISLATIVE IMMUNITY..... 19

TABLE OF CONTENTS – Continued

Page

V. THE ISSUE OF AN ATTORENY-CLIENT RELATIONSHIP BETWEEN PETITIONER AND THE COSTA MESA CITY ATTORNEY PRESENTS A NON-FEDERAL ISSUE ADEQUATELY DECIDED ON INDEPENDENT STATE GROUNDS 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES:

Atchison v. Raffiani, 709 F.2d 96 (3rd Cir. 1983) 20

Barrington v. Missouri, 205 U.S. 483, 27 S.Ct. 582, 51 L.Ed. 890 (1907) 11

Briggs v. Goodwin, 569 F.2d 10 (D.C.Cir. 1977) 14

Briscoe v. Lahue, 46 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983) 19, 20, 21

Buckley v. Fitzsimmons, ___ U.S. ___, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1992) 6, 16

Burns v. Reed, 500 U.S. 478, 11 S.Ct. 1934, 114 L.Ed.2d 547 (1991) 15, 16

Butz v. Economu, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) 18, 19

City of New Orleans v. New Orleans Water Works Co., 142 U.S. 79, 12 S.Ct. 142, 35 L.Ed. 943 (1891) 13

Forrester v. White, 484 U.S. 219, 708 S.Ct. 538, 98 L.Ed.2d 555 (1988) 18

Gladstone Relator v. Village of Bellwood, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) 12

Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) 6, 7, 13, 14, 19

Jones v. Hopper, 410 F.2d 1329 (10th Cir. 1969) 5

Lake County Estates Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) 20

Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) 12

TABLE OF AUTHORITIES – Continued

Page

Lubley v City and County of San Francisco, 98 Cal.App. 3d 340 (1979) 18

Lujan v. Defenders of Wildlife, ___ U.S. ___ 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) 12

Millingar v. Hartuppe, 6 Wall. 258, 18 L.Ed. 829 (1967) 13

Neu v. Corcoran, 869 F.2d 662 (2nd Cir. 1989) 18

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) 5, 11

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 773 (1981) 5, 7, 17

People v. Pendleton, 25 Cal. 3d 371 (1979) 22

People v. Rhodes, 12 Cal. 3d 1880 (1974) 22

Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) 12

Simon v. Eastern Ky. Welfare Right Organization, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) 12

Tenney v. Bradhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1952) 6, 8, 20

U.S. v. Freuhauf, 365 U.S. 146, 81 S.Ct. 547, 5 L.Ed.2d 476 (1961) 13

Ward v. Superior Court, 70 Cal.App. 3d 23 (1977) 22

Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) 12

White v. Frank, 855 F.2d 956 (2nd Cir. 1988) 19, 21

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U.S.C. 1257 ..... 1, 11

42 U.S.C. 1983 ..... *passim*

42 U.S.C. 1988 ..... 1, 3, 14

California Government Code § 815.2 ..... 1, 20

California Government Code § 41801 ..... 1, 3, 22

California Government Code § 41805 ..... 1, 22

California Government Code § 42803.5 ..... 1, 7, 15

California Government Code § 87100 ..... 1, 2

California Government Code § 87103 1

California Government Code § 91000 1

California Government Code Section 91001.5 ..... 7, 15

California Government Code § 91991.5 1

Costa Mesa Municipal Code § 1-33 ..... 1, 8, 15

Costa Mesa Municipal Code § 2-401 ..... 1, 8, 15

Costa Mesa Municipal Code § 2-408 ..... 1, 8, 15

U.S. Constitution, Art. 3, § 1 *et seq.* 12

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the CITY OF COSTA MESA[1], a Municipal Corporation THOMAS A. KATHE, City Attorney for the City of Costa Mesa, ALLAN ROEDER, City Manager for the City of Costa Mesa, and MARY HORNBUCKLE, Mayor of the City of Costa Mesa respectfully pray that petitioner ORVILLE AMBURGEY's Petition for Writ of Certiorari be denied.

STATUTES AND REGULATIONS INVOLVED[2]

28 U.S.C. 1257
42 U.S.C. 1983
42 U.S.C. 1988
California Government Code § 815.2
California Government Code § 41801
California Government Code § 41805
California Government Code § 42803.5
California Government Code § 87100
California Government Code § 87103
California Government Code § 91000
California Government Code § 91991.5
Costa Mesa Municipal Code § 2-401
Costa Mesa Municipal Code § 2-408
Costa Mesa Municipal Code § 1-33

[1] Respondent CITY OF COSTA MESA has no parent or subsidiary companies to be listed pursuant to Supreme Court Rule 29.1.

[2] Text of statutes and municipal codes are fully set forth in Appendix F, attached hereto.

STATEMENT OF THE CASE

1. Factual Background

Petitioner's recitation of the factual setting of this matter contains numerous extraneous, highly inflammatory facts not presented to the California Courts. The facts before the California courts, respectively, were as follows:

On or about October 1990, City Attorney Thomas Kathe was requested, pursuant to the authority vested in him by state and municipal codes, to undertake an investigation of petitioner City Council member Orville Amburgey's business dealing with a company known as Copley Colony Cablevision, Inc. Copley Colony Cablevision, Inc. was the official cable franchise operator for the City of Costa Mesa. It was suspected that petitioner City council member Amburgey, owner of Amburgey Electric, had voted on approval of a Copley Colony contract while having a financial interest in Copley Colony Cablevision, Inc. in violation of the Political Reform Act of 1974, *California Government Code* §§ 87100 et seq. (Petition, p. A-69).

The investigation undertaken by City Attorney Kathe involved review of City documents, files, records, and minutes. Witnesses were interviewed and statements were taken. The City Council was intermittently briefed on the progress of the City Attorney's findings. (Petition pp. A-69-70).

As a result of the investigation, it was concluded that petitioner had violated *California Government Code* sections which constituted a felony under California law.

(Petition p. A-70). It was decided to refer the matter to the District Attorney for prosecution as a felony as the City Attorney was only authorized to prosecute misdemeanors. In the process of transferring the information to the District Attorney, the case was released to the press. (Petition p. A-72). At the next election, petitioner Amburgey was voted out of office by the citizens of the City of Costa Mesa.

Subsequent to the election, a criminal complaint was filed by the District Attorney but was later dismissed prior to trial.

2. Procedural Background

Petitioner thereafter filed a complaint for damages in the Superior Court of the State of California alleging that the acts of respondents infringed on plaintiff's liberty interests as he claimed he was defamed and stigmatized prior to the general election which resulted in the loss of an alleged governmental benefit in the form of his City Council seat. (Petition. p. A-72).

Petitioner brought his cause of action for civil rights violation under federal law (42 U.S.C. §§ 1983, 1988) contending there were no adequate state remedies. (Petition p. A-73).

Petitioner further brought a cause of action for legal malpractice against the City Attorney Kathe, alleging that the City Attorney's duties were to advise the City, and its City officials, regarding their legal rights pursuant to the *California Government Code* § 41801. Petitioner, however, alleged that a conflict of interest existed between the City

Attorney and petitioner because the City Attorney was conducting a review of petitioner's business dealings with Copley Colony. (Petition p. A-76). In a separate cause of action, petitioner alleged breach of a fiduciary duty owed to Petitioner by City Attorney Kathe. (Petition p. A-78). Petitioner alleged other causes of action not at issue herein.

Respondents filed a demurrer to Amburgey's first complaint. Respondents' demurrer was sustained with leave to amend. Petitioner then filed an amended complaint alleging the same causes of action with minor variations. Respondents again demurred to the amended complaint. Respondents demurrer was again sustained, this time without leave to amend. The court specifically found that Amburgey's civil rights cause of action failed to allege violation of a federally protected right. The Court also found that City Attorney Kathe was entitled to absolute immunity from any civil rights cause of action as he was acting completely within his prosecutorial capacity. Similarly, the court found that respondents City Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity. The court further ruled that the causes of action for legal malpractice and breach of a fiduciary duty failed to state a cause of action as City Attorney Kathe did not have an attorney client relationship with Amburgey.

Dissatisfied with the trial court's ruling, petitioner Amburgey filed a motion for reconsideration with a proposed second amended complaint. The trial court reconsidered its ruling and reaffirmed.

Petitioner Amburgey then filed a notice of appeal to the Court of Appeal for the State of California Fourth Appellate District, Division Three, alleging the lower court erred in finding that Amburgey did not have a federal protected right, that City Attorney Kathe was entitled to absolute prosecutorial immunity, that City Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity, and that City Attorney Kathe did not have an attorney client relationship with Amburgey.

Although the appeal was taken from a non-appealable order, the Court of Appeal deemed the order sustaining the demurrer to incorporate a later judgement of dismissal entered by the trial court and treated the notice of appeal as being taken therefrom. Respondents thereafter filed respondents' brief (Appendix B) stating that Amburgey had failed to allege deprivation of a right, immunity or privilege guaranteed under federal law as required to state a cause of action under 42 U.S.C. § 1983 as set forth in *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Respondents further emphasized that Amburgey's contentions that he had a property right in employment as an elected City council member was erroneous as a mere subjective expectancy of employment does not qualify as an "entitlement" under federal law pursuant to *Jones v. Hopper,* 410 F.2d 1329 (10th Cir. 1969). Additionally, the right to be free from damage to reputation claimed by petitioner was likewise meritless as this is not a constitutionally protected liberty or property interest without concomitant evidence of alteration of a pre-existing state right, as set forth in *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 773 (1981).

Respondents further contended that, the issue of whether City Attorney Kathe was entitled to absolute prosecutorial immunity, although relevant only *if* Amburgey demonstrated violation of a Constitutionally protected right, was clearly supported by the U.S. Supreme Court case of *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct 984, 47 L.Ed.2d 128 (1976). Likewise, the granting of absolute legislative immunity to the City Mayor and City Manager was entirely appropriate pursuant to the U.S. Supreme Court case of *Tenney v. Bradhove*, 341 U.S. 367, 379, 71 S.Ct. 783, 95 L.Ed. 1019 (1952).

On July 27, 1993 by letter brief Amburgey requested the California Court of Appeal consider the recent U.S. Supreme Court decision in *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1992), regarding the secondary issue of prosecutorial immunity of City Attorney Kathe. On August 4, 1993, respondents answered Amburgey's letter brief offering their position that the issue of absolute vs. qualified prosecutorial immunity was misplaced, as the true issue before the Court was whether or not Amburgey could allege deprivation of a state right or status under federal law (Appendix C). On October 29, 1993, the Court of Appeals ordered the matter resubmitted.

On November 18, 1993, the California Court of Appeal issued its unpublished opinion affirming the Superior Court judgment in full (Appendix A). The Court of Appeal specifically found that Amburgey's attempt to allege a cause of action for deprivation of a right under color of State law failed (Appendix A, A-6). The Court of Appeal concurred with respondents that at best Amburgey had a mere subjective expectancy of re-employment

as a City council member, not an entitlement to employment, which did not give rise to a property interest for the purpose of the due process clause under 42 U.S.C. § 1983. (Appendix A, p. 8).

Citing this Court's ruling in *Paul v. Davis*, 424 U.S. 693, 702-711, 96 S.Ct. 1155, 47 L.Ed.2d 773, the Court of Appeals held that an alleged damage to reputation, without more, does not rise to the level of a constitutional violation. Most importantly, to be actionable at all, any claimed damage to reputation must concomitantly extinguish a state law right or status, which Amburgey failed entirely to demonstrate (Appendix A, A-9). The state "right" alleged by Amburgey, that he was entitled to run for office and be employed as a City council member, was held not to be an entitlement and further was not extinguished by any acts of respondents whatsoever. Rather, by the will of the voters of the City of Costa Mesa, Amburgey was merely voted out of office. (Appendix A, A-10).

The Court of Appeals further held that this court's decision in *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128, mandated absolute immunity from civil liability for City Attorney Kathe as he was exercising his "judicial or quasi judicial discretion" at all times during the inquiry regarding Amburgey's business dealings (Appendix A, A-14).

Specifically the Court of Appeals held that Section 91001.5 of the *California Government Code* empowered City Attorney Kathe to prosecute violations of the Political Reform Act. Section 42803.5 of the same Code authorized him to prosecute misdemeanor violations occurring in the

City. Further Costa Mesa Municipal Code sections 2-401 and 2-408 mirror the *California Government Code* on conflict of interest and Section 1-33 empowered City Attorney Kathe to prosecute criminal violations of those conflict of interest provisions. The allegations of Amburgey's own complaint compelled the conclusion that City Attorney Kathe was acting as a prosecutor within these provisions entitling him to absolute prosecutorial immunity (Appendix A, A-14-15).

Citing *Tenney v. Brandhove,* 341 U.S. 367, 379, 71 S.Ct. 783, 95 L.Ed.2d 1019, the Court of Appeals held City Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity for all acts undertaken by them.

Finally, the Court of Appeals concluded that City Attorney Kathe and petitioner did not have an attorney client relationship pursuant to California statutory and case law. Accordingly, Amburgey's complaint failed to state a cause of action for legal malpractice or breach of fiduciary regarding City Attorney Kathe.

Amburgey thereafter filed a petition for rehearing. Respondents filed their answer to the petition for rehearing on December 13, 1993 (Appendix D). The petition for rehearing was denied on December 16, 1993.

Amburgey then filed a petition for California Supreme Court review. Respondents filed their answer to the petition for review on January 13, 1994 (Appendix E). Amburgey's petition was denied on March 21, 1994. The instant petition for a writ of certiorari to the Supreme

Court of the United States was filed by Amburgey on July, 17, 1994.

SUMMARY OF ARGUMENT

The jurisdiction of the United States Supreme Court to review a judgment of a state court is limited to justiciable cases or controversies. Petitioner herein has not alleged deprivation of a right, immunity, or privilege guaranteed under federal law and has not set forth a recognizable injury caused by governmental action. Therefore, respondents respectfully submit petitioner lacks standing before this court as to each issue presented for review. Instead, petitioner requests an impermissible advisory opinion regarding the federal doctrine of prosecutorial immunity and legislative immunity and inappropriately requests the court issue an opinion regarding non-federal issues completely decided on adequate state law grounds.

The California Court of Appeal expressly and correctly decided that former Costa Mesa City council member Amburgey failed to present facts sufficient to allege deprivation of a right, immunity, or privilege guaranteed under federal law for an invasion of privacy or interference with a property right in his elected position of city council member. Petitioner failed to demonstrate that any loss of such a right, immunity or privilege resulted from respondent City officials' conduct in their investigation of Amburgey's possible violations of the Political Reform Act and possible felony acts while in his role as City council member.

Notwithstanding petitioner's complete failure to demonstrate deprivation of a federally recognized right, the California Court of Appeal also correctly addressed the secondary issue of prosecutorial immunity afforded respondents for all acts undertaken in pursuit of their investigation and acts initiated to protect the public from an elected official who potentially had violated *California Government Code* sections constituting a felony under California law.

Petitioner's writ here fails to present a justiciable issue as petitioner does not set forth deprivation of any right, privilege or immunity claimed under the Constitution. Instead, petitioner focuses upon an alleged misapplication of the doctrine of prosecutorial immunity and legislative immunity which are only relevant if petitioner had, in fact, been deprived of a federally protected right.

Therefore, petitioner lacks standing as the petition fails to set forth an appropriate federal interest at stake. Petitioner further impermissibly requests the Court issue an advisory opinion regarding the doctrine of prosecutorial immunity and legislative immunity and request review of state action where no party before the court has suffered or immediately faces deprivation of a federal right. For these reasons, respondents respectfully contend petitioner's writ of certiorari should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

I. PETITIONER LACKS STANDING BEFORE THIS COURT AND HAS NOT PRESENTED A JUSTICIABLE CASE OR CONTROVERSY UNDER FEDERAL LAW AND FURTHER INAPPROPRIATELY REQUESTS ADVISORY OPINIONS.

The jurisdiction of the United States Supreme Court to review a judgement of a state court is governed by 28 U.S.C. § 1257. The right of review provided by § 1257 is not unlimited, and must serve the important policy of achieving consistent decision regarding federal rights. (*Barrington v. Missouri*, 205 U.S. 483, 27 S.Ct. 582, 51 L.Ed. 890). Review of an issue under § 1257 cannot exceed the scope of Article III of the Constitution; therefore, jurisdiction to review applies only to justiciable cases or controversies. Section 1257 provides:

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statues of or any commission held or authority exercised under the United States."

In this instance, petitioner is required at the outset to allege the deprivation of a right, immunity or privilege guaranteed under federal law. (28 U.S.C. § 1257; *Parratt v. Taylor*, 451 U.S. 517, 535, 101 S.Ct. 527, 68 L.Ed.2d 420

(1981)). Petitioner has not set forth in his questions presented *any* deprivation of a right immunity or privilege under federal law. Instead, petitioner inappropriately focuses on respondents affirmative defenses of prosecutorial immunity and legislative immunity in this matter.

Respondents, therefore, respectfully submit petitioner lacks standing before this court. The touchstone of Article III standing is that petitioner must demonstrate an actual injury as a result of the challenged official conduct which is real and immediate and not conjectural or hypothetical. (U.S. Constitution, Art. 3, § 1 et seq.) Petitioner must have a stake in a legally redressable injury. (*Gladstone Relator v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct 1601, 1607, 60 L.Ed.2d 66 (1979)). In other words, the standing doctrine requires not only that a bona fide Constitutional claim be asserted, it requires that the litigant have suffered an injury in fact. (*Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)). Although the injury need not be economic, it must be actual or imminent. (*Lujan v. Defenders of Wildlife*, ___ U.S. ___ 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

Further, the challenged governmental action must be the cause of the alleged injury. (*Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). This requirement is strictly imposed by Article III of the Constitution. (*Simon v. Eastern Ky. Welfare Right Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)). Additionally where the petitioner asserts multiple claims, as herein, a separate analysis of standing is required as to each claim asserted. (*Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)).

As early as 1867, it was recognized that to afford the basis for U.S. Supreme Court review, not only must there be a federal question presented, the federal question must be substantial. (*Millingar v. Hartuppe*, 6 Wall. 258, 18 L.Ed. 829 (1967)). The bare averment of a federal question is not sufficient as there must be grounds for such an averment, otherwise a federal question might be set in almost any case. (*City of New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 12 S.Ct. 142, 35 L.Ed. 943 (1891)).

Petitioner, again, has set forth absolutely no actual injury incurred as a result of challenged official conduct where a valid federal right exists.

Therefore, as evidenced by petitioner's questions presented, petition merely sets forth an abstract or hypothetical question to the high court inviting an advisory opinion regarding the issue of prosecutorial immunity and legislative immunity to be afforded City officials in a case where no injury has been, or could be, properly alleged under the Constitution. Respondents respectfully submit that the court may not issue an advisory opinion and must only address those issues that are clearly focused and involve specific conflicts. (*U.S. v. Freuhauf*, 365 U.S. 146, 81 S.Ct. 547, 5 L.Ed.2d 476 (1961)). For these reasons, respondents urge that petitioner's writ be denied.

II. THE CALIFORNIA COURTS CORRECTLY FOUND THAT CITY ATTORNEY KATHE WAS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY PURSUANT TO THE U.S. SUPREME COURT CASE OF *IMBLER V. PACHTMAN*.

Petitioner alleges in his first issue presented for review that the California Supreme Court wrongly

refused to hear Amburgey's Petition for Review and wrongfully sustained the Court of Appeals grant of absolute prosecutorial immunity to respondents. Petitioner claims the California courts ignored federal decisions and inappropriately extended the U.S. Supreme Court's decision in *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

However, petitioner fails to appreciate the true issue in this matter is whether Amburgey's complaint and first amended complaint alleged sufficient facts to constitute *any* violation of a federally protected right pursuant to 42 U.S.C. § 1983 or § 1988, and only secondarily, whether City officials protected by an absolute immunity for acts allegedly causing the deprivation of a federally protected right. Without deprivation of a federally protected right, privilege or immunity, the petitioner lacks standing before this Court, and the petition is therefore without merit.

Nevertheless, the California Court of Appeals did not err in their analysis of the issue of prosecutorial immunity. In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), this court held that strong public policy mandated absolute immunity from civil liability for a prosecutor because public trust would suffer if the prosecutor were constrained in every decision hampered by his own potential liability. (*Id.*, pp. 424-425). In *Briggs v. Goodwin*, 569 F.2d 10 (D.C.Cir. 1977), the D.C. Circuit held that the crucial inquiry regarding the question of prosecutorial immunity centers on the nature of the official behavior challenged, not in the title of the officer responsible therefor. (*Id.*, p. 21). Read together, *Imbler* and *Briggs* establish that City Attorney Kathe was absolutely

immune for prosecutorial activities undertaken within his role.

In the instant matter, § 91001.5 of the *California Government Code* gave the respondent City Attorney Kathe the power to prosecute violations of the Political Reform Act. Section 42803.5 of the *California Government Code* gave him the authority to prosecute misdemeanor violations occurring in the City. Costa Mesa Municipal Code §§ 2-401 and 2-408 mirror the *California Government Code* regarding conflict of interest, and § 1-33 allows the City Attorney to prosecute criminal violations of the conflict of interest provisions. The California Court of Appeal, therefore, correctly held that the allegations of Amburgey's own complaint compelled the conclusion that City Attorney Kathe was acting as a prosecutor under these provisions when he undertook investigation of Amburgey's suspected violations of the Political Reform Act.

Disclosure of the inquiry into petitioner's actions to the concerned public via the press and to the district attorney for further felony investigation were part and parcel of the City Attorney Kathe's job as a prosecutor as authorized by the *California Government Code* and the Costa Mesa Municipal Code. Petitioner's complaint, while alleging that City Attorney Kathe undertook "investigative" acts, fails to allege any facts in support thereof and uses the term of art in hopes of confusing prosecutorial acts with extra-prosecutorial acts, where no confusion exists.

Further, the California Court of Appeal did not fail to appreciate the federal court decisions rendered in *Burns v. Reed*, 500 U.S. 478, 11 S.Ct 1934, 114 L.Ed.2d 547 (1991).

Contrary to petitioner's contention, this court in *Burns v. Reed,* did not hold that acts of a prosecutor in interrogating witnesses and obtaining evidence is "investigative" in nature. In *Burns v. Reed,* this court held there was no historical nor common-law support to extend absolute immunity to acts of a state prosecutor who advised police how to conduct the investigative phase of a criminal case. Petitioner comes to the erroneous conclusion that since police investigative acts are entitled to only qualified immunities, then acts of investigation by a prosecutor, acting as a prosecutor, are also entitled to qualified immunity. (Petition, p. 19). Petitioner cites no authority whatsoever for this unwarranted conclusion and ignores completely that the acts undertaken by City Attorney Kathe were completely within his role as prosecutor and were in no manner extra-prosecutorial.

Petitioner further likens the acts undertaken by City Attorney Kathe within his prosecutorial role to extra-prosecutorial acts undertaken by the prosecutor in the case of *Buckley v. Fitzsimmons,* ___ U.S. ___, 113 S.Ct. 2606, 125 L.Ed.2d 209. It is important to note the *Buckley* decision involved a critical finding that cannot be made herein: that a constitutional violation had occurred for which 42 U.S.C. § 1983 provided a remedy. In *Buckley,* Buckley commenced his action after being wrongly incarcerated for three years with a clear loss of liberty. His incarceration was found to be a result of fabricated false evidence and false statements made by a prosecutor for the purpose of securing the prosecutor's reelection. The statements of the prosecutors were made exclusively for personal gain in securing their reelection. However, none of the same facts are at issue herein. Amburgey was not

deprived of a federally recognized right, nor did the City Attorney Kathe fabricate false evidence nor make false statements for personal gain. The two factual situations are entirely dissimilar and the legal issues inapposite.

III. THE CALIFORNIA COURTS CORRECTLY FOUND THAT PETITIONER DID NOT PRESENT ANY RECOGNIZED CIVIL RIGHTS VIOLATION.

Petitioner next alleges that the California courts erred by finding that statements made by the City Attorney Kathe were entitled to absolute prosecutorial immunity. Petitioner alleges that he suffered violation of his "civil rights" which he defines as "failure to compete equally in the election, monetary loss to his business and loss of compensation as a council member" as a result of statements made by the City Attorney. (Petition, p. 23). Once again, however, petitioner fails to appreciate none of the alleged losses are federally recognized civil rights.

Petitioner erroneously contends that he has alleged a government interest in being employed as an elected City council member for the City of Costa Mesa. (Petition, p. 23-24). However, this is simply not the case, as evidenced by petitioner's failure to cite authority in support thereof.

In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 773 (1976), this court made it clear that a party may not indirectly bring a defamation action under 42 U.S.C. § 1983 merely because the defendant is a governmental official, unless he can demonstrate stigmatization and the depravation of a state law right or status. (*Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 47 L.Ed.2d (1976)).

Petitioner attempts to contrive a tenuous link between a stigma he claims he suffered as a result of the investigation of his suspect business dealings and loss of an elected position. However, petitioner ignores completely that cases dealing with termination of employment involve a conscious decision by a governmental official to deprive an employee of that employment. (e.g. *Neu v. Corcoran,* 869 F.2d 662 (2nd Cir. 1989) and *Lubley v City and County of San Francisco,* 98 Cal.App. 3d 340 (1979)).

In the instant case, petitioner did not have a vested interest in his council seat, nor was he terminated by an act of a governmental official. His employment was in no manner curtailed by respondents. Petitioner was simply voted out of office by the voters of the City of Costa Mesa as was their prerogative.

Petitioner further contends that the California courts strayed from the functional approach enunciated in *Butz v. Economu,* 438 U.S. 478, 511-12, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) and *Forrester v. White,* 484 U.S. 219, 277, 708 S.Ct. 538, 98 L.Ed.2d 555 (1988) by granting City Attorney Kathe absolute prosecutorial immunity. (Petition p. 25).

The functional approach, as described in *Forrester v. White, supra,* involves examination of the nature of the function entrusted to an official in an effort to evaluate the effect exposure to liability would have on the efficient exercise of the official's duties. (*Forrester v. White,* 484 U.S. 219, 277, 708, S.Ct. 538, 98 L.Ed.2d 555). Unlike the case here, *Forrester* involved a state court judge, not a prosecutor, and questioned whether a judge had absolute immunity from suit for his decision to demote and discharge a court employee. Under the circumstances, it was held

that the judge was entitled to only qualified immunity for his acts as they were not intimately associated with his function as a judge. Furthermore, unlike the case herein, an actual property interest had been infringed by governmental action.

In *Butz v. Economu,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), this court specifically reaffirmed the holding in *Imbler v. Pachtman, supra,* wherein it was held that the prosecutor's functional role in the criminal justice system necessarily required absolute immunity as qualified immunity might have an adverse effect on the function of the criminal justice system by discouraging the initiation of prosecutions and affecting the prosecutor's effective conduct. (*Butz v. Economu,* 438 U.S. 478, 510).

Therefore, it is clear the California courts did not fail to appreciate and apply the "functional" approach, and in fact closely and appropriately applied it in the instant case.

IV. THE CALIFORNIA COURTS CORRECTLY FOUND THE CITY MAYOR AND CITY MANAGER WERE ENTITLED TO ABSOLUTE LEGISLATIVE IMMUNITY

Petitioner contends that the California courts' grant of absolute legislative immunity to City council members and the City Manager was an unwarranted extension of *Briscoe v. Lahue,* 46 U.S. 325 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), and conflicts with a second circuit decision in *White v. Frank,* 855 F.2d 956 (2nd Cir. 1988) warranting U.S. Supreme Court review.

Once again, absent a federally protected right, privilege or immunity granted petitioner, the issue of legislative immunity is academic only. Nevertheless, the California courts did not err in holding a legislator acting in a sphere of legitimate legislative activity is absolutely immune from civil liability for his or her acts. (*Tenney v. Bradhove*, 341 U.S. 367, 379, 71 S.Ct 783, 95 L.Ed. 1019 (1952)).

In *Tenney v. Bradhove, supra*, members of the California Legislature were charged with wrongful investigation and requesting a local prosecutorial official to bring a criminal action against Tenney. Tenney alleged the acts of the member of the legislature were done to intimidate and silence him in an effort to deter and prevent him from exercising his constitutional rights. (*Id.*, p. 371). However, this court held that the legislators were entitled to absolute legislative immunity as the investigations were a necessary and well recognized part of representative government. (*Id.*, p. 377). This holding has specifically been extended to regional and municipal officials. (*Lake County Estates Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979); *Atchison v. Raffiani*, 709 F.2d 96 (3rd Cir. 1983)). Based on the allegations in petitioner's own complaint, Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity. Additionally, the *California Government Code* § 815.2 (b) specifically exempts the City from an act or omission or a City employee. the City, therefore, is immune from liability to petitioner as well.

Petitioner states that the California courts incorrectly extended this court's decision in *Briscoe v. Lahue*, 46 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983) but petitioner

fails to discuss his contention in the body of the writ. *Briscoe* presented a question of statutory construction of 42 U.S.C. § 1983 questioning whether a convicted person could assert a claim for damages against a police officer for giving perjured testimony at the convict's criminal trial. This court held that witnesses are absolutely immune from liability based on their testimony, even where a governmental official (in the *Briscoe* case, a police officer) testified regarding performance of his official duties. (*Id.*, p. 326). The *Briscoe* case, therefore, appears to present an entirely disparate issue, completely unrelated to the case at bar and bears no relevance to petitioner's contention in his question presented, i.e., that the California courts improperly extended the holding in *Briscoe*. Respondents submit this is an entirely meritless contention improperly presented and improperly briefed herein.

Petitioner further contends that the California courts' decision conflicted with a second circuit decision in *White v. Frank,* warranting U.S. Supreme Court review; however, once again, petitioner fails to set forth any argument regarding the *White v. Frank,* decision and even fails to set forth a citation for that case. Respondents, therefore, merely point out that petitioner has failed entirely to brief yet another basis upon which he requests his petition for a writ be granted.

V. THE ISSUE OF AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN PETITIONER AND THE COSTA MESA CITY ATTORNEY PRESENTS A NON-FEDERAL ISSUE ADEQUATELY DECIDED ON INDEPENDENT STATE GROUNDS.

Lastly, petitioner contends that the issue of whether or not respondent City Attorney Kathe and petitioner had

an attorney-client relationship is worthy of U.S. Supreme Court review. It must be assumed, though not set forth in Amburgey's petition, that petitioner is contending that he was injured as a result of an action by the City Attorney. Once again, petitioner sets forth no federal right, privilege or immunity he was deprived as a result of the alleged wrongful actions of City Attorney Kathe. Without such an allegation, petitioner again lacks standing before this court. Further, petitioner appears to set forth a purely state law issue, i.e., whether under California law City Attorney Kathe and petitioner had an attorney-client relationship. This issue was completely decided by the California Court of Appeal.

The California Court of Appeal clearly concluded that according to the case of *Ward v. Superior Court*, 70 Cal.App. 3d 23 (1977), the City Attorney had only one client: the City of Costa Mesa. (*Id*, p. 32). Additionally, *California Government Code* § 41805 clearly sets forth that the City Attorney charged with prosecutorial discretion shall not represent any person accused of violating an ordinance of the City that employs the attorney. (*People v. Pendleton*, 25 Cal. 3d 371, 379 (1979); *People v. Rhodes*, 12 Cal. 3d 1880, 1887 (1974)). Therefore, as a matter of California law, respondent City Attorney Kathe was absolutely precluded from performing or entering into an attorney-client relationship with Amburgey.

Further, according to *California Government Code* § 41801, the City Attorney may *only* advise the City officials in matters pertaining to City business. Again,

according to state and federal law, a City Attorney may not be exposed to civil liability for performing his duties.

CONCLUSION

The jurisdiction of the United States Supreme Court to review a judgment of a state court is limited to justiciable cases or controversies. Petitioner herein has not alleged deprivation of a right, immunity or privilege guaranteed under federal law and has not set forth a recognizable injury caused by governmental action. Therefore, respondents respectfully submit petitioner lacks standing before this court as to each issue presented for review. Instead petitioner requests an impermissible advisory opinion regarding the federal doctrine of prosecutorial immunity and legislative immunity and inappropriately requests the court issue an opinion regarding non-federal issues completely decided on adequate state law grounds.

For all of the above reasons, respondents respectfully request Orville Amburgey's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

FILED NOVEMBER 18, 1993

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ORVILLE AMBURGEY, Plaintiff and Appellant, v. CITY OF COSTA MESA, et al., Defendants and Respondents.	GO13222 (Super. Ct. No. 669203) OPINION

APPEAL from a judgment of the Superior Court of Orange County, Randall K. Wilkinson, Judge. Affirmed.

Burns & Oblachinski and Michael F. Burns for Plaintiff and Appellant.

Michael M. McMahon and Edwin J. Richards for Defendants and Respondents.

* * *

Plaintiff Orville Amburgey, former Costs Mesa councilman, was investigated for conflict of interest by the city attorney, who then referred the matter to the Orange County District Attorney. When the district attorney dismissed the charges, Amburgey filed a complaint for damages against the city, its mayor, Mary Hornbuckle, its city manager, Allan Roeder, and its city attorney, Thomas

Kathe (collectively respondents). Respondents' demurrer to the first amended complaint was sustained without leave to amend and Amburgey appeals, contending: (1) he had a federally protected right to bring his action; (2) Kathe was entitled only to qualified immunity because he acted as an investigator; (3) Hornbuckle and Roeder were only entitled to qualified immunity because they were not acting in a legislative capacity; and (4) Amburgey and Kathe had an attorney/client relationship which Kathe breached.[1]

FACTS

Amburgey was a Costa Mesa city council member. He also owned Amburgey Electric, a business which performed subcontract work for a company which provided cable television to the city under a franchise agreement. City Attorney Kathe concluded Amburgey may have violated state conflict of interest laws by voting on a franchise agreement with that company.[2] He informed City

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[1] The order sustaining the demurrer without leave to amend is not appealable. (Code Civ. Proc., § 904.1.) However, a judgment of dismissal was entered by the court on July 26, 1993. Therefore, because the parties have briefed the issues, in the interests of justice and to prevent unnecessary delay, we deem the order sustaining the demurrer to incorporate the judgment and treat the notice of appeal as being taken therefrom. (See *Munoz v. Florentine Gardens* (1991) 235 Cal.App.3d 1730, 1731-132.)

[2] Kathe believed Amburgey violated Government Code sections 87100, 87103 and 91000 of the Political Reform Act of 1974. (All statutory references are to the Government Code unless otherwise specified.)

Manager Roeder of his conclusions and referred his findings to the district attorney. It was Kathe's belief Amburgey may have committed felonies and Kathe was only empowered to prosecute misdemeanors. Thereafter, the district attorney's office conducted its own investigation and, after filing a misdemeanor charge against Amburgey, subsequently dismissed all criminal charges.

Amburgey then filed his complaint for damages against respondents, alleging causes of action for deprivation of rights under color of state law (42 U.S.C., §§ 1983, 1988), legal malpractice, breach of fiduciary duty, conspiracy, slander per se, libel per se, intentional infliction of emotional distress, and negligent infliction of emotional distress. The gravamen of the complaint was that respondents injured him by reporting the apparent criminal violations to the district attorney and the press. After respondents' demurrer was sustained with leave to amend, Amburgey filed a first amended complaint, and, at this time, respondents' demurrer was sustained without leave to amend.

Section 87100 provides in part: "no public official . . . shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

Section 87103 states in part: "An official has a financial interest in a decision . . . if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family . . . "

Under section 91000, a violation of the Political Reform Act is prosecuted as a misdemeanor.

The trial court ruled Amburgey's civil rights cause of action failed to allege any violation of a federally protected right, that City Attorney Kathe was entitled to absolute immunity because he was acting in his prosecutorial capacity, and that Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity. As for the legal malpractice and breach of fiduciary duty causes of action against Kathe, the court ruled the complaint failed to state a cause of action based on an attorney/city relationship.

The court then granted Amburgey's motion for reconsideration and affirmed its prior ruling. This appeal followed.

STANDARD OF REVIEW

In ruling on an order sustaining a demurrer without leave to amend, this court must determine whether the complaint states a cause of action even though "the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged." (*Matteson v. Wagoner* (1905) 147 Cal. 739, 742; see also *Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1043.) The question is whether the complaint states a cause of action under any legal theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.) Moreover, any material fact alleged in the complaint must be assumed true, except for contentions, deductions, or conclusions of fact or law, and allegations contradicted by judicially noticed facts. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572.)

DISCUSSION

A. The Cause of Action for Civil Rights Violations

Amburgey attempted to allege a cause of action for deprivation of rights under color of state law. (42 U.S.C. §§ 1983, 1988.)[3] To state such a cause of action, plaintiff must allege the deprivation of a right, immunity, or privilege guaranteed under federal law. (*Parratt v. Taylor*

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[3] 42 U.S.C. section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. section 1988 states in part: "(a) The jurisdiction . . . conferred on the district courts by the provisions of this title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons of the United States in the civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and governed the said courts in the trial and extended to and governed the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

(1981) 451 U.S. 527, 535.) Amburgey's first amended compliant alleged respondents deprived him of his rights, privileges and immunities under the United States Constitution in that their actions "amounted to an arbitrary invasion . . . the security of [Amburgey's] privacy, person and business and were not authorized by law." It further alleged he had a property right in employment as a city council member, that he had the right to be free from stigma, and that he was damaged as a result of stigma caused by respondents and loss of employment as a council member.

As for his contention that respondents deprived him of a property right in the form of employment. Amburgey is correct that government employment *may*, under certain circumstances, be a protected property interest. However, the mere subjective expectancy of employment does not give rise to a property interest for the purpose of bringing the due process clause into play in an action under 42 U.S.C. section 1983. (See *Jones v. Hopper* (10th Cir. 1969) 410 F.2d 1329.) A discharged employee must have an "entitlement" to employment before he or she is entitled to a protected property interest. Here, Amburgey had no entitlement to continued employment as a council member. At most, he had a subjective expectancy of continued employment, but no property interest in continuing as a council member.

In addition, the United States Supreme Court has made it clear that an allegation of defamation by a government official does not give rise to a cause of action for civil rights violations. (*Paul v. Davis* (1976) 424 U.S. 693, 712). In *Paul* the plaintiff claimed government officials violated his rights by including his name on a list of

shoplifters which was circulated to businesses, and argued the stigmatization impaired his future employment opportunities. However, the Supreme Court affirmed the dismissal of his action, noting that the mere fact that a state official is the alleged tortfeasor does not give rise to a federal civil rights cause of action and that damage to reputation alone does not rise to the level of a constitutional violation. (*Id.* at pp. 700-701.) The Supreme Court reemphasized a long line of case law holding that damage to reputation, without more, does not rise to the level of a constitutional violation. (*Id.* at pp. 702-711.) Accordingly, Amburgey was required to allege that respondents damaged his reputation *and* altered or extinguished a state law right or status. He failed to do so.

Amburgey argues the Supreme Court held in *Paul v. Davis, supra,* 424 U.S. 693 that "there is a liberty interest protected by the Fourteenth Amendment when you are dealing with termination of employment benefits . . . " However, *Paul* makes it clear that a plaintiff may not indirectly bring a defamation action under 42 U.S.C. section 1983 merely because the defendant is a government official, unless he or she can show stigmatization *and* the deprivation of a state law right or status.

The "state right" alleged by Amburgey is his "right to run for office and be gainfully employed as a city councilman . . . " However, Amburgey failed to allege facts sufficient to show that respondent altered or extinguished *any* right. His employment as a council member was altered or extinguished by the voters of Costa Mesa, not respondents.

Amburgey's reliance upon *Wisconsin v. Constantineau* (1971) 400 U.S. 433 is misplaced. He argues that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (*Id.* at p. 437.) However, the Supreme Court in *Paul* rejected Amburgey's interpretation of the language in *Wisconsin v. Constantineau*, stating that the language "could be taken to mean that if a government official defames a person, without more, the procedural requirements of the Due Process Clause of the Fourteenth Amendment are brought into play. If read that way, it would represent a significant broadening of the holdings of [prior Supreme Court cases]." (*Paul v. Davis, supra,* 424 U.S. at p. 708.) Here, as in *Paul,* no governmental action deprived Amburgey of a right he previously held under state law.

Amburgey seeks to rely upon *Rodriquez De Quinonez v. Perez* (1st Cir. 1979) 596 F.2d 486 for the proposition that he "had a state right to run for office and to be gainfully employed as a city councilman. [He] had a right to be considered equal with other individuals who were also running for that position. The government action in this case deprived him of that right by placing him in an extreme disadvantage to the other candidates . . . " However, *Rodriquez De Quinonez* is inapposite. There, the plaintiffs were former directors of the Bank of Puerto Rico. The trial court found their removal by the Secretary of Treasury amounted to a violation of a liberty interest because their removal stigmatized them and denied them a right previously held under state law. (*Id.* at p. 489.) Here, unlike the plaintiffs in *Rodriquez De Quinonez,* Amburgey has not been able to identify any state right

which could have been arguably extinguished by respondents. He claims a state law right to run for and hold office but there is no authority for the source of such a right. Moreover, the plaintiffs in *Rodriquez De Quinonez* were removed from their positions by a government official. (*Id.* at p. 488.) Here, Amburgey cannot allege that respondents terminated or removed him from his position. He was removed by the voters.

Amburgey also seeks to rely upon *Haight v. City of San Diego* (1991) 228 Cal.App.3d 413 and *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340 for the proposition that where there is deprivation of a "liberty" guaranteed under the due process clause, a nontenured employee who is stigmatized as a result of termination is entitled to due process. Again, the argument ignores the fact that in those cases, the plaintiffs were terminated by government employees. (*Haight v. City of San Diego*, supra, at p. 415; *Lubey v. City and County of San Francisco, supra*, 98 Cal.App.3d at p. 344.) Any actionable stigma to a plaintiff's reputation must result from his or her termination or dismissal from employment.

Amburgey argues termination is not required, relying on *Perry v. Sindermann* (1972) 408 U.S. 593. In *Perry*, the plaintiff brought suit when his employment was not renewed. As with cases involving termination, however, *Perry* involved a conscious decision by government officials to end the plaintiff's employment, thus triggering the due process requirements. (See e.g., *Neu v. Corcoran* (2nd Cir. 1989) 869 F.2d 662; *Lubey v. City and County of San Francisco, supra*, 98 Cal.App.3d at p. 344.)

Here, Amburgey merely alleges he was defamed by respondents. He attempts to turn a potential state law cause of action into a federal civil rights action by alleging a tenuous link between the "stigma" he suffered and his loss of employment. However, he was not terminated, and his employment was in no way curtailed by respondents. He was voted out of office by the voters of the City of Costa Mesa. For these reasons, Amburgey failed to state facts sufficient to show that any federal right was infringed upon, and the trial court properly ruled that he failed to state a cause of action under 42 U.S.C. section 1983.

B. Was Kathe Entitled to absolute Prosecutorial Immunity?

Amburgey next contends City Attorney Kathe was not entitled to absolute prosecutorial immunity because he acted as an investigator. The substance of his allegations is that he was injured because Kathe brought charges against him, then turned the matter over to the district attorney and notified the press. Under a long line of Supreme Court cases, Kathe's actions must be considered prosecutorial and he is entitled to absolute immunity.

In *Imbler v. Pachtman* (1976) 424 U.S. 409, the United States Supreme Court emphasized the strong public policy considerations mandating absolute immunity from civil liability for a prosecutor under such circumstances. The court observed that the mere grant of qualified immunity to a prosecutor would undermine his or her performance and that "public trust of the prosecutor's

office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." (*Id.* at pp. 424-425.)

In *Briggs v. Goodwin* (D.C. Cir. 1977) 569 F.2d 10, the Court of Appeals observed that the "crucial inquiry [on the question of immunity] concerns the nature of the official behavior challenged, not the identity or title of the officer responsible therefor." (*Id.* at p. 21.) The court defined prosecutorial activities as the exercise of "judicial or quasi-judicial discretion." (*Ibid.*; see also *McCray v. Maryland* (4th Cir. 1972) 456 F.2d 1, 3-4.)

Read together, *Imbler* and *Briggs* establish that a prosecutor is absolutely immune for prosecutorial activities. Here, Kathe's actions justified the grant of absolute immunity.

Section 91001.5 gives a city attorney the power to prosecute violations of the Political Reform Act. Section 42803.5 authorizes a city attorney to prosecute misdemeanor violations occurring in his or her city. Costa Mesa Municipal Code sections 2-401 and 2-408 parallel the Government Code on conflict of interest, and section 1-33 empowers the city attorney to prosecute criminal violations of those conflict of interest provisions. Here, the allegations of Amburgey's complaint compel the conclusion that Kathe was acting as a prosecutor under these provisions.

Although Amburgey claims Kathe's investigative activities damaged him, the complaint alleges only that Kathe and others disclosed the results of their investigation to the press and turned over their results to the

district attorney. These actions were part and parcel of the decision by the city attorney to initiate a prosecution as authorized by the Government Code and the Costa Mesa Municipal Code. A prosecutor is absolutely immune from liability under section 1983 for his or her conduct in initiating a prosecution so long as that conduct is "intimately associated with the judicial phase of the criminal process." (*Imbler v. Pachtman, supra,* 424 U.S. at 430-431; see also *Burns v. Reed* (1991) 500 U.S. ___, ___ 114 L.ed.2d 547, 558.) Here, Amburgey alleges Kathe engaged in investigative acts. It is true that the Supreme Court in *Imbler* did not decide whether absolute immunity should extend to "those aspects of the prosecutor's responsibility that cast him in the role of an . . . investigative officer rather than that of an advocate." (*Imbler v. Pachtman, supra,* at pp. 430-431.) However, the court noted that "the duties of the prosecutor in his role as advocate . . . involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." (*Id.* at p. 431, fn. 33.) Here, fairly read, Amburgey's complaint seeks to predicate an action for damages upon the contention that Kathe, "acting within the course and scope of [his] employment," brought criminal charges against Amburgey for conflict of interest, then referred the matter to the district attorney who filed, then dismissed, criminal charges. Kathe was authorized by Government Code sections 91001.5 and 41803.5 to prosecute violations of the Political Reform Act and to prosecute misdemeanor violations occurring in the city. He was similarly empowered by Costa Mesa Municipal Code sections 2-401, 2-408 and 1-33 to enforce conflict of interest laws. Although the complaint states Kathe's actions were

investigative, the alleged facts reveal his acts were part of the decision of whether to initiate a prosecution against Amburgey, and as such within his duties as a prosecutor. (*Imber v. Pachtman, supra,* 424 U.S. at p. 431, fn. 33; *Burns v. Reed, supra,* 500 U.S. at p. ___. Kathe is entitled to absolute immunity for the allegations in Amburgey's complaint.[4]

C. Were Hornbuckle and Roeder Entitled to Absolute Legislative Immunity?

Amburgey next argues that Mayor Hornbuckle and City Manager Roeder are not entitled to absolute immunity. Again, we disagree.

As the United States Supreme Court has made clear, a legislator who acts in a sphere of legitimate legislative activity is absolutely immune from civil liability for his or her acts. (See *Tenney v. Brandhove* (1952) 341 U.S. 367, 379.) in *Tenney,* the plaintiff charged members of the California Legislature with investigating, then requesting local prosecutorial officials to instigate a criminal action against him. He alleged these acts were not done with a legislative purpose but to "intimidate and silence [him] and deter and prevent him from effectively exercising his constitutional rights . . . " (*Id.* at p. 371.) The Supreme

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[4] The complaint, while alleging "investigative activities" fails to state facts sufficient to overcome the absolute immunity. Rather, it is a thinly veiled attempt to disguise a cause of action for malicious prosecution, for which a prosecutor is absolutely immune. (*Burns v. Reed, supra,* 500 U.S. at p. ___, citing *Vaselli v. Goff* (1926) 265 U.S. 503.)

Court held the legislators were entitled to absolute immunity, stating that investigations are a necessary and well recognized aspect of representative government. (*id.* at p. 377.) The only question, according to the court, is whether the legislator has acted in an area where legislators traditionally have the power to act. (*Id.* at p. 379.) Tenney's proclamation as to absolute legislative immunity to state legislators has subsequently been applied to regional and municipal officials. (See, e.g., *Lake County Estates, Inc. v. Tahoe Reg'l. Planning Agency* (1979) 440 U.S. 391; *Healy v. Town of Pembroke Park* (11th Cir. 1987) 831 F.2d 989; *Atchison v. Raffiani* (3rd Cir. 1983) 709 F.2d 96.)

Public policy supports the grant of absolute immunity to legislators acting in an area where they are traditionally empowered to act. Based on the allegations of the complaint, Hornbuckle and Roeder are entitled to absolute immunity.

Moreover, "except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (Govt. Code, § 815.2, subd. (b).) Because respondents Kathe, Hornbuckle and Roeder had absolute immunity for their alleged acts committed within the course and scope of their duties, respondent City of Costa Mesa cannot be held liable to Amburgey either.

D. Did Kathe and Amburgey Have an Attorney/Client Relationship?

Finally, in his first amended complaint and proposed second amended complaint, Amburgey alleges cause of

action against City Attorney Kathe for legal malpractice and breach of fiduciary duty, claiming Kathe for legal malpractice and breach of fiduciary duty, claiming Kathe and he had an attorney/client relationship, which Kathe breached. He ignores the fact that Kathe's client was the City of Costa Mesa and it was the city to which he owed a duty.

In *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, the Court of Appeal concluded that a county counsel's representation of county offices in civil actions did not alter the fact that county counsel has only one client, the county. (*Id.* at p. 32; see also *Meehan v. Hopps* (1956) 144 Cal.App.2d 284, 290 ["attorney for a corporation represents it, its stockholders and its officers in their representative capacity. He in nowise represents the officers personally."].)

In addition, Government Code section 41805 provides that the city attorney charged with prosecutorial discretion shall not represent any person accused of violating an ordinance of the city that employs the attorney. (See also *People v. Pendleton* (1979) 25 Cal.3d 371, 379; *People v. Rhodes* (1974) 12 Cal.3d 1880, 187.) Thus, respondent Kathe was precluded from performing or entering into any attorney/client relationship with Amburgey concerning the alleged conflict of interest charges.

Amburgey alleges legal malpractice under Government Code section 41801, which provides that "[t]he city attorney shall advise the city officials in all matters pertaining to city business." However, this has no effect on the issue of any relationship between the city attorney and a city council member. Again, section 41801 provides

that the city attorney's advice is restricted to "legal matters pertaining to city business." Nothing in section 41801 requires a city attorney to give advice to a city official facing criminal charges.

Here, the allegations of the first amended complaint reveal only that respondent Kathe fulfilled his duty to the city and did not give protection or advice to Amburgey. A city attorney may not be exposed to civil liability for performing his or her duties. Accordingly, Amburgey's complaint fails to state a cause of action for legal malpractice or breach of fiduciary duty.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

MOORE, ACTING P.J.

WE CONCUR:

WALLIN, J.

CROSBY, J.

APPENDIX B

4th Civil No.
G013222

IN THE
Court of Appeal
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ORVILLE AMBURGEY,
Plaintiff and Appellant,

vs.

CITY OF COSTA MESA, et al.,
Defendants and Respondents.

APPEAL FROM
SUPERIOR COURT OF ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE
O.C.S.C. No. 66-92-03

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

I. STATEMENT OF THE CASE 1

a. Factual History 1

b. Procedural History 2

II. ISSUES PRESENTED 4

III. STANDARD OF REVIEW 4

IV. ARGUMENT 5

a. An Order Granting a Demurrer Without Leave to Amend is a Nonappealable Order 6

b. Plaintiff Fails to Allege Violation of a Federally Protected Right 6

c. City Attorney Kathe is Entitled to absolute Prosecutorial Immunity Under Imbler v. Pachtman 14

d. Defendants Hornbuckle and Roeder are Entitled to Absolute Legislative Immunity 17

e. City Attorney Kathe and Plaintiff Did Not Have an Attorney-Client Relationship 20

V. CONCLUSION 24

TABLE OF AUTHORITIES

Pages

CASES

Atchison v. Raffiani 708 F.2d 96 (3d Cir. 1983) 18

Briggs v. Stafford 569 F.2d 10 (D.C. Cir. 1977) .. 14, 15, 19

Coalition for Los Angeles County v. Board of Supervisors (1977) 76 Cal.App.3d 241 13

Dennis v. S&S Consolidated Rural High School Dist. 577 F.2d 338 (5th Cir. 1978) 9, 11

Haight v. City of San Diego (1991) 228 Cal.App.3d 413.....11, 12

Hazelwood v. Hazelwood (1976) 57 Cal.App.3d 693..... 13

Healy v. Town of Pembroke Park 831 F.2d 989 (11th Cir. 1987)..... 18

Heger v. City of Costa Mesa (1991) 231 Cal.App.3d 42..... 13

I. J. Weinrot and Son v. Jackson (1985) 40 Cal.3d 327..... 6

Imbler v. Pachtman 424 U.S. 409 (1976) .. 14, 15, 17, 19

Interiors v. Petrak (1987) 188 Cal.App.3d 1363..... 4

Joint Anti-Fascist Refugee Comm. v. McGrath 341 U.S. 123 (1951) 8

Jones v. Hopper 410 F.2d 1323 (10th Cir. 1969) *cert. denied*, 397 U.S. 991..... 7

Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency 440 U.S. 391 (1979)..... 18

Logan v. Southern California Rapid Transit Dist. (1982) 136 Cal.App.3d 116 17

Lubey v. City and County of San Francisco (1979) 98 Cal.App.3d 340 11-13

McCray v. Maryland 456 F.2d 1 (4th Cir. 1972) 15

Meehan v. Hopps (1956) 144 Cal.App.2d 284 .....21, 22

Medina v. Rudman 545 F.2d 244 (1st Cir. 1976)..... 11

Neu v. Corcoran 869 F.2d 662 (2d Cir. 1989)..... 13

Paul v. Davis 424 U.S. 693 (1976) 8-10

People v. Pendleton (1979) 25 Cal.3d 371..... 22

People v. Rhodes (1974) 12 Cal.3d 180; 70 Op.Atty.Gen. 271 (1987)..... 22

Perry v. Sinderman 408 U.S. 593 (1972) 12

Peterson v. Knutson 367 F. Supp. 515 (D. Minn. 1973)..... 6

Rodriguez de Quinonez v. Perez 596 F.2d 486 (1st Cir. 1979) 11

Tenney v. Bradhove 341 U.S. 367 (1951)..... 17-19

Ward v. Superior Court (1977) 70 Cal.App.3d 23 20-22

Weiman v. Updergraff 344 U.S. 183 (1952)..... 8

Wisconsin v. Constantineau 400 U.S. 433 (1971)....8, 10

FEDERAL STATUTE

42 U.S.C. § 1983..... 4, 6, 7, 9, 10, 13

STATE STATUTES

California Government Code

§ 815.2 19

§ 41801..... 23

§ 41803.5 15

§ 41805 22

§ 41805(a)(1) 22

§ 83116.5 23

§ 87100 ..... 1, 2

§ 87103 ..... 1, 2

§ 91000 1

§ 91001.5 15

RULE

California Rules of Professional Conduct Rule 4-101 21

TEXT

9 Witkin, *California Procedure*, Appeal § 268 (3d ed. 1985) 4, 5

CONSTITUTION

United States Constitution 14th Amendment 8-10

MUNICIPAL CODES & ORDINANCES

Costa Mesa Municipal Code

section 1-33 16

section 2-401 16

section 2-408 16

PERIODICALS

60 A.B.A.J. 1541 (1974)..... 23
37 Fed. B.J. 61 (Fall 1978)..... 23
94 Harv. L. Rev. 1244 (1981) 23
89 Maine L. Rev. 155 (1966)..... 23

No. G013222

COURT OF APPEAL – FOURTH DISTRICT

DIVISION THREE

STATE OF CALIFORNIA

ORVILLE AMBURGEY,

Appellant,

vs. No. 66-92-03

CITY OF COSTA MESA, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT
OF ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE

RESPONDENTS' BRIEF

I. STATEMENT OF THE CASE

a. Factual History

In 1990, after an investigation of existing City of Costa Mesa contracts, Costa Mesa City Attorney Thomas

Kathe (City Attorney Kathe) discovered what appeared to be violations of Government Code sections 87100, 87103, and 91000 by plaintiff and appellant Orville Amburgey. City Attorney Kathe's investigation revealed that then city council member Amburgey may have voted in favor of amending a contract with an independent subcontractor for cablevision rights in Costa Mesa. Council member Amburgey had a business relationship with the subcontractor before and after the vote on the contract.

After concluding the investigation, City Attorney Kathe advised city council members of the apparent conflict of interest, as required by the Costa Mesa Municipal Code (CMMC). Because he believed Amburgey may have committed felonies and because he was empowered to prosecute only misdemeanors, City Attorney Kathe referred the case to the Orange County District Attorney for felony prosecution. The district attorney investigated the case further and charged Amburgey with violations of Government Code sections 87100 and 87103. After discovering information not available to City Attorney Kathe at the time the case was referred, the district attorney dismissed the criminal charges against Amburgey.

b. Procedural History

This case commenced when plaintiff filed a complaint containing causes of action for: 1) civil rights violation; 2) legal malpractice; 3) breach of fiduciary duty; 4) conspiracy; 5) slander per se; 6) libel per se; 7) intentional infliction of emotional distress; and 8) negligent infliction of emotional distress (record p. 2). Named as defendants were the City of Costa Mesa (Costa Mesa), Mayor Mary

Hornbuckle, City Manager Allan Roeder, and City Attorney Thomas Kathe. All of plaintiff's causes of action revolved around his contention that defendants injured him by reporting his apparent criminal violations to the Orange County District Attorney and the press (record pp. 2-27). Defendants demurred to the complaint. Judge Randall Wilkinson of the Orange County Superior Court sustained the demurrers with leave to amend (record pp. 62, 63). Plaintiff then filed an amended complaint, alleging the same causes of action (record p. 67).

With some minor variations, plaintiff's amended complaint was the same as the original complaint. Defendants again demurred, and the court again sustained the demurrers, this time without leave to amend (record pp. 219, 221). The court found that plaintiff's civil rights cause of action failed to allege violation of a federally protected right (record pp. 259, 269). The court also found that City Attorney Kathe was entitled to absolute immunity from the civil rights cause of action because he was acting in a prosecutorial capacity (record p. 259). Similarly, the court found that defendants Hornbuckle and Roeder were entitled to absolute legislative immunity (record pp. 269-70). The court also ruled that the causes of action against City Attorney Kathe for legal malpractice and breach of fiduciary duty failed to state a cause of action because plaintiff and City Attorney Kathe did not have an attorney-client relationship (record p. 260). The court made additional rulings that are unrelated to the causes of action appealed here.

Plaintiff then filed a motion for reconsideration and submitted a proposed second amended complaint containing causes of action for 1) civil rights violation; 2)

legal malpractice; and 3) breach of fiduciary duty (record p. 222). The court reviewed the proposed second amended complaint and reconsidered its ruling. The court allowed the original ruling to stand, finding that plaintiff failed to state a cause of action (record p. 282).

Plaintiff now appeals from the order of the Orange County Superior Court granting the demurrers without leave to amend. Apparently, this appeal is only as to the causes of action for civil rights violation, legal malpractice, and breach of fiduciary duty.

II. ISSUES PRESENTED

1) Does plaintiff allege facts sufficient to state a cause of action for a 42 U.S.C. civil rights violation?

2) Is City Attorney Kathe entitled to absolute prosecutorial immunity for reporting plaintiff's alleged criminal acts to the district attorney?

3) Are defendants Hornbuckle and Roeder entitled to absolute legislative immunity for reporting plaintiff's alleged criminal acts?

4) Did City Attorney Kathe and plaintiff have an attorney-client relationship for purposes of his causes of action for legal malpractice and breach of fiduciary duty?

III. STANDARD OF REVIEW

"On appeal, 'a judgment . . . of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' "

" 'Where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court.' " *Interiors v. Petrak* (1987) 188 Cal.App.3d 1363 (quoting 9 Witkin, *California Procedure,* Appeal § 268 (3d ed. 1985). Plaintiff fails to show such error and, in fact, fails even to address the applicable standard of review on appeal. When all evidence is considered in the light most favorable to prevailing defendants, the trial court's judgment should be affirmed.

IV. ARGUMENT

This case involves a disgruntled former city council member who was not reelected and a city attorney trying to enforce the provisions of the Political Reform Act. Plaintiff's first cause of action for civil rights violation fails because it does not identify a federally protected right that was violated. Even assuming for the sake of argument he can identify such a right, the cause of action fails because all defendants are immune from liability. City Attorney Kathe was acting in a prosecutorial capacity and is therefore entitled to absolute prosecutorial immunity. Defendants Hornbuckle and Roeder are entitled to absolute legislative immunity. Because all defendant city employees are immune, the City of Costa Mesa is also immune. Plaintiff's second and third causes of action for legal malpractice and breach of fiduciary duty also fail because City Attorney Kathe and plaintiff did not have an attorney-client relationship.

Strong public policies underlie the decisions granting absolute immunity for both prosecutorial and legislative activities. The trial court recognized the public policy

importance of such immunity and found that all defendants are immune. Public policy also supports the trial court's ruling that the City of Costa Mesa is City Attorney Kathe's client and that he and plaintiff did not have an attorney-client relationship. To hold otherwise would place city attorneys in the unenviable position of deciding whether to enforce the laws of the city and state or to remain silent where the allegedly criminal acts of a city official are involved.

a. An Order Granting a Demurrer Without Leave to Amend is a Nonappealable Order.

An appeal may be taken from only a final judgment terminating the proceedings below. "An order sustaining a demurrer without leave to amend is *not* an appealable order; only a judgment on such an order can be appealed." *I. J. Weinrot and Son v. Jackson* (1985) 40 Cal.3d 327, 331. As of the date of the filing of this brief, no judgment has been entered in the present action. The only order is the order sustaining the demurrers without leave to amend, which is not appealable.

b. Plaintiff Fails to Allege Violation of a Federally Protected Right.

To state a cause of action under 42 U.S.C. section 1983, a plaintiff must allege deprivation of a right, immunity, or privilege guaranteed under federal law. *Peterson v. Knutson,* 367 F. Supp. 515 (D. Minn. 1973). Plaintiff's proposed second amended complaint fails to do so, and the demurrer was properly sustained on this ground.

Defendants respectfully submit that the trial court's ruling on this issue should be affirmed by this court.

Plaintiff's alleged constitutional rights are never clearly stated, but the proposed second amended complaint states that defendants "infringed on plaintiff's liberty interests in that he was defamed and stigmatized as a criminal six days before the general election which resulted in the loss of a government benefit, that being employment as a city councilman . . . " (record p. 234). Decisions of federal and state courts reveal that plaintiff does not state facts sufficient to allege violation of a federally protected right.

Plaintiff's proposed second amended complaint appears to claim as the basis of his section 1983 cause of action three "federal rights:" 1) a property right in employment as a city council member; 2) freedom from stigma; and 3) a combination of stigma and loss of employment. The first two "rights" can be disposed of summarily, and a reading of plaintiff's proposed second amended complaint reveals that he has failed to state a cause of action under the third category.

Plaintiff's proposed second amended complaint alleges that defendants deprived him of a property right in the form of employment (record p. 230). In some cases, government employment may be a protected property interest. However, a mere subjective expectancy of employment does not give rise to a property interest for the purpose of bringing the due process clause into play in a section 1983 action. *Jones v. Hopper,* 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991. A discharged employee must have an "entitlement" to employment

before it becomes a protected property interest. Plaintiff in the present action had no entitlement to continued employment as a council member. At best he had a subjective expectancy of continued employment. Plaintiff had no property interest in employment as a council member.

The argument that defamation by government officials gives rise to a cause of action for civil rights violation was rejected by the United States Supreme Court in the seminal case *Paul v. Davis,* 424 U.S. 693 (1976). The plaintiff in *Paul* claimed that defendant government officials violated his federal rights by including his name on a list of active shoplifters that was circulated to businesses. Plaintiff claimed this action stigmatized him and impaired his future employment opportunities. In affirming the dismissal of the plaintiff's action, the Supreme Court held that: 1) the fact a state official is the tortfeasor does not give rise to a federal civil rights cause of action and 2) damage to reputation, by itself, does not rise to the level of constitutional violation.

The Supreme Court first summarily dismissed the argument that the due process clause should extend to plaintiff the right to be free of injury wherever the state is characterized as the tortfeasor. The Court concluded that "such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 700-01.

The *Paul* Court then cited a long line of cases in support of its holding that damage to reputation, without more, does not rise to the level of constitutional violation.

In these cases, reputation was protected only when a right or status previously recognized by state law was distinctly altered or extinguished. *Id.* at 702-11 *citing Wisconsin v. Constantineau,* 400 U.S. 433 (1971); *Weiman v. Updergraff,* 344 U.S. 183 (1952); *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123 (1951). Subsequent cases have referred to this as the "stigma-plus" test. *E.g., Dennis v. S&S Consolidated Rural High School Dist.,* 577 F.2d 338, 341 (5th Cir. 1978). In *Paul,* the Court found that the plaintiff did not demonstrate that any state law right or status was affected. *Paul,* 424 U.S. at 712.

Because *Paul* rejected the argument that damage to reputation alone does not give rise to a civil rights cause of action, plaintiff's complaint must succeed or fail on the "stigma-plus" test. That is, plaintiff must allege that defendants damaged his reputation and altered or extinguished a state law right or status.

Plaintiff makes vague allegations but fails to state a cause of action under *Paul* and cases following it. Plaintiff simply has not pleaded that defendants have altered or extinguished any state law right or status.

Plaintiff's brief on the subject of federally protected rights begins with an erroneous interpretation of *Paul v. Davis,* 424 U.S. 693 (1976). According to plaintiff, *Paul* held that "there is a liberty interest protected by the Fourteenth Amendment when you are dealing with termination of employment benefits" (plaintiff's brief p. 4). The real issue addressed in *Paul* is whether a plaintiff who alleges he was stigmatized by official state action can state a cause of action for civil rights violation under 42 U.S.C. section 1983. In *Paul,* the Supreme Court held

that such a stigma, without more, does not give rise to a section 1983 cause of action. *Id.*

The plaintiff's claim of federal rights violation is flawed under the holding of *Paul*. First, even assuming the plaintiff was stigmatized by defendants' alleged actions, the mere fact that defendants are government officials does not create a civil rights cause of action. In fact, plaintiff's civil rights cause of action appears to be no more than a camouflaged defamation action. Second, even assuming plaintiff can show he was stigmatized, the proposed second amended complaint fails to show the "plus" required to state a cause of action under section 1983.

The "state right" claimed by plaintiff appears to be the "right to run for office and be gainfully employed as a city councilman" (plaintiff's brief p. 7). If this is in fact the state law right or status plaintiff claims was altered, his argument fails for two reasons. First, plaintiff cites no authority to support the position that California recognizes this "right." Second, plaintiff fails to show that defendants altered or extinguished this right. Plaintiff's employment as a council member was altered or extinguished by the voters of Costa Mesa, not defendants.

Interestingly, in support of his position that he has a protected liberty interest, plaintiff cites *Wisconsin v. Constantineau*, 400 U.S. 507 (1971) (plaintiff's brief p. 6). However, this quote is taken completely out of context, as is demonstrated in *Paul*. In *Paul*, the Supreme Court cited the exact passage plaintiff cites and stated that this language "could be taken to mean that if a government official defames a person, without more, the procedural

requirements of the Due Process Clause of the Fourteenth Amendment are brought into play. If read that way, it would represent a significant broadening of the holdings of" prior Supreme Court cases. *Paul,* 424 U.S. at 708. The Court refused to read the passage so broadly. *Id.*

In support of his position that he alleges violation of a federally protected right, plaintiff cites *Rodriguez de Quinonez v. Perez,* 596 F.2d 486 (1st Cir. 1979). However, neither *Rodriguez de Quinonez* nor any of the cases cited in the passage plaintiff quotes are on point. In *Rodriquez de Quinonez,* the plaintiffs were former directors of the Bank of Puerto Rico. The court found that their removal by the Secretary of the Treasury of Puerto Rico amounted to violation of a liberty interest where the removal stigmatized plaintiffs and denied them a right previously held under state law. *Id.* at 489.

Two important points distinguish *Rodriquez de Quinonez* from the present action. First, plaintiffs in that case were specifically able to identify the source of the state right that was extinguished. *Id.* The plaintiff in the present action has claimed state law rights to run for and hold office but not identified the source of those "rights." Second, plaintiffs were removed from their positions by a government official. *Id.* at 488. Plaintiff in the present has not and cannot state that defendants terminated or removed him from his position. The cases cited in the passage that plaintiff cites from *Rodriquez de Quinonez* are also distinguished on this basis. *See, e.g., Dennis v. S&S Consolidated Rural High School Dist.,* 577 F.2d 338 (5th Cir. 1978) (local government officials refused to renew plaintiff's teaching contract); *Medina v. Rudman,* 545 F.2d 244

(1st Cir. 1976) (government officials refused to grant plaintiff a permit for Greyhound track).

Similarly, the California decisions cited by plaintiff do nothing to support his position. *See Haight v. City of San Diego* (1991) 228 Cal.App.3d 413; *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340. Although plaintiff is correct that both cases hold that due process is required when a non-tenured employee is stigmatized as a result of termination, plaintiff ignores the fact that both cases involved *termination by governmental employers. Haight,* 228 Cal.App.3d at 415; *Lubey,* 98 Cal.App.3d at 344. In fact, in *Haight,* plaintiff's case was dismissed because he voluntarily resigned before termination and had no property interest in his government employment.

Lubey stated that the exception to the rule of no due process requirement for termination of non-tenured employees "will be applied where the probationary employee's job termination, or dismissal, is based on charges which 'stigmatize' his reputation, or 'seriously impair' his opportunity to earn a living . . . , or which 'might seriously damage his standing and associations in the community." 98 Cal.App.3d at 346 (citations omitted). Significantly, this language from *Lubey* demonstrates that the stigma must be the result of *termination or dismissal* from employment. Defendants in the present action did not dismiss or terminate plaintiff's employment; the voters of Costa Mesa did.

To support his contention that a termination of employment is not required, plaintiff cites *Perry v. Sinderman,* 408 U.S. 593 (1972), which arose from the non-

renewal of employment. By contending that *Perry* stands for the proposition that termination or dismissal is not required, plaintiff attempts to play a game of semantics. Whether the plaintiff's employment ends directly through discharge or a non-renewal of employment is not the relevant point. A conscious decision by government officials to end employment is the common thread running through cases finding that due process is required with "stigma-plus" loss of employment. *See, e.g., Neu v. Corcoran*, 869 F.2d 662 (2d Cir. 1989); *Heger v. City of Costa Mesa* (1991) 231 Cal.App.3d 42, 47; *Lubey*, 98 Cal.App.3d 340, 344.

At most, plaintiff's proposed second amended complaint alleges that defendants defamed him. Plaintiff, however, has attempted to turn this state law cause of action into a federal civil rights action by alleging a tenuous link between the "stigma" he suffered and his loss of employment. The voters of the City of Costa Mesa voted plaintiff out of office. Even assuming for the sake of argument plaintiff can plead that he was elected out of office because of defendants' actions, he has failed to allege violation of a civil right. In short, defendants did not terminate plaintiff, refuse to renew his employment, remove him from his position, or in any way alter his status. Plaintiff has failed to allege a civil rights violation.

Because plaintiff has failed to state facts sufficient to show that any federal right was infringed, the trial court ruled that he failed to state a cause of action under section 1983. For this reason, the rulings on prosecutorial and legislative immunity were not necessary to the final judgment. Ordinarily, courts of appeal should not pass on

questions that are not necessary to their decision. *Coalition for Los Angeles County v. Board of Supervisors* (1977) 76 Cal.App.3d 241; *Hazelwood v. Hazelwood* (1976) 57 Cal.App.3d 693. Should this court uphold the trial court's ruling that plaintiff failed to allege violation of a federally protected right, the issues of prosecutorial and legislative immunity from liability for a civil rights cause of action need not be addressed.

c. City Attorney Kathe is Entitled to Absolute Prosecutorial Immunity Under Imbler v. Pachtman.

Plaintiff's proposed second amended complaint and opening brief make much of City Attorney Kathe's allegedly investigative activities. However, the real substance of plaintiff's claim for civil rights violation is that he was injured when the charges against him were turned over to the district attorney and the press. Because City Attorney Kathe's action in referring the case to the district attorney was prosecutorial, he is entitled to absolute immunity under *Imbler v. Pachtman,* 424 U.S. 409 (1976).

In granting prosecutors absolute immunity from civil liability in *Imbler,* the Supreme Court emphasized the public policy considerations underlying its decision. The Court reasoned that granting the prosecutor only a qualified immunity for prosecutorial actions would undermine the prosecutor's performance and that "the public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler,* 424 U.S. at 424-25. The *Imbler* Court, however, emphasized the boundaries of its holding and refused to

decide whether a prosecutor is entitled to absolute immunity for investigative activities. *Id.* at 430.

The issue left open in *Imbler* was decided by the United States Court of Appeal in *Briggs v. Stafford*, 569 F.2d 10 (D.C. Cir. 1977). *Briggs* granted only a qualified immunity to prosecutors acting in an investigative capacity. In granting this qualified immunity, the court stated that when a prosecutor acts in an investigative capacity, the public policy concerns cited in *Imbler* no longer control. *Id.* at 21. *Briggs* therefore concluded that in such situations prosecutors should be granted the same limited immunity as government investigators. *Id.*

In determining whether to grant absolute or limited immunity to a government official, *Briggs* stated that the "crucial inquiry concerns the nature of the official behavior challenged, not the identity or title of the officer responsible therefor." *Id.* The court gave further assistance in this distinction by defining prosecutorial activities as the exercise of "judicial or quasi judicial discretion." *Id., quoting McCray v. Maryland*, 456 F.2d 1, 3-4 (4th Cir. 1972). *Briggs* found the defendant prosecutor's act of concealing the identity of government witnesses from the court to be investigative because it was unrelated to advocacy issues such as whether to initiate or how to conduct a prosecution. 569 F.2d at 21.

Briggs did not, and in fact could not, overrule *Imbler's* grant of absolute immunity to prosecutors acting as advocates. *See Briggs*, 569 F.2d at 22. What remains after *Imbler* and *Briggs* is an absolute immunity for prosecutorial activities and a qualified immunity for investigative or administrative activities. The public policy concerns

expressed in *Imbler*, 424 U.S. at 424-25, continue to justify a grant of absolute immunity for civil actions related to prosecutorial discretion.

Several Government Code sections and provisions of the Costa Mesa Municipal Code (CMMC) authorize the city attorney to act as a prosecutor. Government Code section 91001.5 gives city attorneys the power to prosecute violations of the Political Reform Act. Government Code section 41803.5 authorizes city attorneys to prosecute misdemeanor violations occurring in their cities. CMMC sections 2-401 and 2-408 incorporate the Government Code's conflict of interest laws, and section 1-33 empowers the city attorney to prosecute criminal violations of the conflict of interest provisions. City Attorney Kathe was acting as a prosecutor under these provisions at the time of the actions giving rise to plaintiff's second amended complaint.

Plaintiff's proposed second amended complaint contains allegations about City Attorney Kathe's "investigative" activities. A close review of the second amended complaint reveals, however, that the crux of plaintiff's cause of action for civil rights violations remains his allegation that City Attorney Kathe and others disclosed the results of the investigation to the press and turned over the same results to the Orange County District Attorney for criminal prosecution. Such actions were not investigative, but part of the decision whether to initiate a prosecution against plaintiff. Had the district attorney not commenced a criminal prosecution, City Attorney Kathe had authority to commence a criminal prosecution.

Plaintiff fails to allege how any of City Attorney Kathe's "investigative" activities violated his civil rights. Plaintiff claims that he was deprived of employment and stigmatized as a criminal. These are the "civil rights" that plaintiff claims were violated. However, the plaintiff's proposed second amended complaint reveals that these "violations" could only result from City Attorney Kathe's referral of the plaintiff's case to the district attorney and the report of the referral to the media. Neither the media nor the district attorney was notified of the investigation while it was being conducted.

To overcome a demurrer, a complaint must allege ultimate facts, not merely evidentiary facts or conclusions of law. *Logan v. Southern California Rapid Transit Dist.* (1982) 136 Cal.App.3d 116. The trial court correctly ruled that plaintiff's original complaint, first amended complaint, and proposed second amended complaint, while alleging "investigative activities" failed to state facts sufficient to overcome immunity under *Imbler* Plaintiff's proposed second amended complaint and opening brief rely on conclusory statements that City Attorney Kathe's activities were investigatory and not prosecutorial. The trial court's ruling that City Attorney Kathe is entitled to absolute immunity was correct and should not be disturbed on appeal.

d. Defendants Hornbuckle and Roeder are Entitled to Absolute Legislative Immunity.

Plaintiff's proposed amended complaint relies on conclusory allegations regarding the actions of defendants Hornbuckle and Roeder to attempt to establish that

they are not absolutely immune from liability. A review of plaintiff's allegations, however, reveals that defendants Hornbuckle and Roeder are entitled to absolute immunity from plaintiff's cause of action for civil rights violation.

In 1951, the United States Supreme Court held that legislators who act in a sphere of legitimate legislative activity are absolutely immune from civil liability for their acts. *Tenney v. Bradhove,* 341 U.S. 367, 379 (1951). *Tenney* involved an action against members of the California Legislature. Plaintiff charged that these legislators investigated and asked local prosecutorial officials to initiate a criminal action against him. Plaintiff alleged that these acts were not done with a legislative purpose but to "intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights. . . . " *Id.* at 371.

In holding that the legislators were entitled to absolute immunity the Court stated that investigations are a well established component of representative government." *Id.* at 377. The Court reasoned that the courts are not the forum for determining whether legislators' motive in conducting such investigations are proper. The only relevant inquiry is whether the legislators were acting in an area where legislators traditionally have power to act." *Id.* at 379.

Although *Tenney* dealt with state legislators, subsequent cases have established that the absolute legislative immunity applies to regional and municipal officials. *See. e.g., Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency,* 440 U.S. 391 (1979); *Healy v. Town of Pembroke*

Park, 831 F.2d 989 (11th Cir. 1987); *Atchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983). *Lake Country* emphasized that *Tenney* recognized the need to provide immunity for the public good and found that "this reasoning is equally applicable to federal, state, and regional legislators." 440 U.S. at 405.

Plaintiff's brief confuses the immunities for prosecutors and legislators when it says that defendants Hornbuckle and Roeder were acting as investigators and are entitled to only qualified immunity. In fact, plaintiff cites in support of this proposition *Imbler v. Pachtman*, 424 U.S. 409 (1976) and *Briggs v. Stafford*, 569 F.2d 10 (D.C. Cir. 1977). However, both *Imbler* and *Briggs* addressed only prosecutorial immunity; neither mentioned legislative immunity.

Additionally, plaintiff's argument that defendants Hornbuckle and Roeder are not entitled to absolute immunity because they are alleged to have acted as investigators goes against the logic of the holding of *Tenney*. As previously mentioned, *Tenney* specifically dealt with allegations that a legislative investigation was conducted to violate plaintiff's civil rights. *Tenney* emphasized the importance of legislative investigations and refused to grant only qualified immunity where legislators investigate. 341 U.S. at 347.

Despite plaintiff's conclusory allegations, he has failed to show that defendants Hornbuckle and Roeder are not entitled to absolute immunity. The public policy considerations underlying *Tenney* and cases following it support a grant of absolute immunity to defendants

Hornbuckle and Roeder. Plaintiff has failed to demonstrate the trial court erred in finding that defendants Hornbuckle and Roeder are entitled to absolute legislative immunity. The ruling should therefore stand.

"Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Government Code § 815.2. Because defendants Kathe, Hornbuckle, and Roeder are immune from liability for all acts within the course and scope of their duties, Costa Mesa cannot be held liable to plaintiff.

e. City Attorney Kathe and Plaintiff Did Not Have an Attorney-Client Relationship.

Plaintiff's second and third causes of action in his proposed second amended complaint are for legal malpractice and breach of fiduciary duty against defendant City Attorney Kathe only. Plaintiff set out virtually identical causes of action in his original and first amended complaints. The demurrers to these causes of action were twice sustained, the second time without leave to amend. The trial court properly ruled that plaintiff's second amended complaint again fails to state a cause of action for legal malpractice and breach of fiduciary duty.

Plaintiff's second and third causes of action are against City Attorney Kathe only and in substance are indistinguishable from one another. Plaintiff alleges legal malpractice and breach of fiduciary duty arising from City Attorney Kathe's investigation and referral of the

plaintiff's activities. City Attorney Kathe exercised reasonable care in the representation of his client, the City of Costa Mesa, and breached no fiduciary duty to plaintiff.

The plaintiff implies in his proposed second amended complaint that City Attorney Kathe and the plaintiff had an attorney-client relationship. Plaintiff also contends that one of Kathe's duties was to represent city officials, including the plaintiff. Plaintiff, however, ignores that Costa Mesa was City Attorney Kathe's client and his duty was owed to the city.

In *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, the appellate court issued a writ of mandate ordering a trial court to vacate its order granting a county assessor's motion to disqualify county counsel from representing government employees in a civil suit by the county assessor. The county assessor's motion argued that allowing county counsel to represent the defendants would constitute a violation of California Rules of Professional Conduct 4-101, which provides that an attorney shall not accept employment adverse to a client or former client. The assessor contended that he and county counsel had an attorney-client relationship because county counsel was the legal representative of the assessor's office and allegedly counsel the assessor on personal legal matters. *Id.* at 27-28.

Although the Ward court found that Rule 4-101 applies to a government attorney, it concluded that county counsel's representation of the defendants did not constitute a violation of the rule. In so holding the court stated that "Los Angeles County Counsel has only one client, namely the County of Los Angeles." *Id.* at 32.

While county counsel was obligated to represent county officers in civil actions, that obligation only extended to matters in which the officers acted in their representative capacity and within the scope of their official duties. *Id.*

Ward found the relationship between county counsel and county officers to be analogous to that of a corporate attorney and officers and cited *Meehan v. Hopps* (1956) 144 Cal.App.2d 284 to support its holding that the assessor and county counsel had no attorney-client relationship. 70 Cal.App.3d at 32-33. In *Meehan,* a shareholders suit named Hopps, a former director, as a defendant. Hopps moved to disqualify corporate counsel from representing plaintiffs on the ground that Hopps had in the past turned over documents to corporate counsel that might be used against him in the suit. Hopps contended that he had an attorney-client relationship with corporate counsel.

Meehan found that the "attorney for a corporation represents it, its stockholders and its officer in their representative capacity. He nowise represents the officers personally." 144 Cal.App.2d at 290. The court found that the attorney's first duty was to the corporation. Disqualifying corporate counsel would preclude him from serving his client's interests. Ward found such reasoning persuasive in the case of a government attorney and public officers. Ward therefore found no attorney-client relationship between the assessor and county counsel. 70 Cal.App.3d at 34.

In addition to the well-reasoned holdings of *Ward* and *Meehan,* Government Code section 41805 provides that a city attorney charged with prosecutorial discretion

shall not represent any person accused of violating an ordinance of the city that employs the attorney. The city attorney can represent such a person only if the attorney is relieved of his or her prosecutorial duties by the city. Government Code § 41805(a)(1); *see People v. Pendleton* (1979) 25 Cal.3d 371; *People v. Rhodes* (1974) 12 Cal.3d 180; 70 Op.Atty.Gen. 271 (1987). Thus, as a matter of law, City Attorney Kathe was precluded from forming an attorney-client relationship with council member Amburgey concerning the conflict of interest charges.

Legal commentators also support the position that government attorneys are expected to report illegal behavior and corruption of public officials to the appropriate government agencies and officers.[1] *See. e.g.*, 94 Harv. L. Rev. 1244 1420 n.26 (1981); 89 Maine L. Rev. 155, 160 (1966); 37 Fed. B.J. 61, 70 (Fall 1978); 60 A.B.A.J. 1541, 1542 (1974). The Los Angeles City Attorney's Office reached a similar conclusion in a May 1987 opinion. Opinion No. 87-302. Thus to the extent a council member discusses alleged illegal behavior with the city attorney, a confidential relationship does not exist because of the city attorney's duty to disclose illegal conduct and corruption.

In the proposed second amended complaint, the only addition to the allegations for legal malpractice is a description of city attorneys' duties under Government Code section 41801. This section states that "the city attorney shall advise the city officials in all matters pertaining to city business." This provision in no way affects

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[1] In fact, there is support for the position that a city attorney may be held criminally liable for failing to report violations of the Reform Act. See Government Code § 83116.5.

the analysis of the relationship between a city attorney and a city council person that led to the trial court to sustain the demurrer to the plaintiff's causes of action in his original and first amended complaints.

Plaintiff's complaint conveniently ignores the language of section 41801 that states that the city attorney's advice is restricted to "legal matters pertaining to city business." Nothing in section 41801 requires a city attorney to advise a city official of his or her legal rights when criminal charges against that official are contemplated. Section 41801 does not change the fact that the city attorney's client is the city and that the first duty is to the city.

City Attorney Kathe's first duty is to Costa Mesa. In fact, his conduct in fulfilling that duty is the exact conduct that plaintiff claims gives rise to his second and third causes of action. City Attorney Kathe was directed to determine whether city contracts complied with state and city requirements. Exposing a city attorney to civil liability for performing his or her duties might well have the effect of chilling that attorney's performance. The trial court properly concluded that plaintiff failed to state a cause of action for legal malpractice or breach of fiduciary duty because City Attorney Kathe and plaintiff did not have an attorney-client relationship. This ruling should be affirmed.

V. CONCLUSION

The trial court correctly concluded that plaintiff failed to alleged violation of a federally protected right. The court also concluded correctly that all defendants are entitled to absolute immunity for civil liability for their

actions. City Attorney Kathe was acting in a prosecutorial capacity at the time of the acts alleged in plaintiff's proposed second amended complaint. The acts of defendants Hornbuckle and Roeder were legislative in nature and they also are entitled to immunity. Finally, the trial court correctly ruled that City Attorney Kathe and plaintiff did not have an attorney-client relationship for purposes of his causes of action for legal malpractice and breach of fiduciary duty. Plaintiff has failed to demonstrate reversible error and the ruling of the trial court should be affirmed.

DATED: February 9, 1993

Respectfully submitted,

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BY: _____

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PROOF OF SERVICE BY MAIL

In Re: RESPONDENTS' BRIEF; 4th Civil No. G013222
Caption: Orville Amburgey vs. City of Costa Mesa, et al.
Filed: IN THE COURT OF APPEAL, Fourth Appellate District, Division Three

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 311 South Spring Street, Suite 200, Los Angeles, California 90013. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Los Angeles, California, addressed as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on February 12, 1993 at Los Angeles, California.

/s/ Donald Johnson D. JOHNSON

4th Civil No.
G013222

IN THE
Court of Appeal
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ORVILLE AMBURGEY,
Plaintiff and Appellant,

vs.

CITY OF COSTA MESA, et al.,
Defendants and Respondents.

APPEAL FROM
SUPERIOR COURT OF ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE
O.C.S.C. No. 66-92-03

RESPONDENTS' ADDITIONAL BRIEF

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TABLE OF CONTENTS

Page

I. ARGUMENT 1

a. Plaintiff's Complaint Fails to Meet the "Stigma-Plus" Test of Paul v. Davis 2

b. City Attorney Kathe is Entitled to Immunity 4

c. Defendants Hornbuckle and Roeder are Entitled to Absolute Immunity 4

d. This Appeal Should be Dismissed..... 4

II. CONCLUSION 5

TABLE OF AUTHORITIES

Page

Cases

Imbler v. Pachtman 424 U.S. 409 (1976) .....

Kaprelian v. Texas Women's University 509 F.2d 133 (5th Cir. 1975)..... 2

Marrero v. City of Hialeah 625 F.2d 499 (5th Cir. 1980).....2, 3

Owen v. City of Independence 445 U.S. 635 (1980) 3

Paul v. Davis 424 U.S. 693 (1976) 2, 3

Tenney v. Bradhove 341 U.S. 367 (1951)..... 4

Wisconsin v. Constantineau 400 U.S. 433 (1971)..... 2

No. G013222

COURT OF APPEAL – FOURTH DISTRICT

DIVISION THREE

STATE OF CALIFORNIA

ORVILLE AMBURGEY,

Appellant,

vs. No. 66-92-03

CITY OF COSTA MESA, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE

RESPONDENTS' ADDITIONAL BRIEF

I ARGUMENT

Respondents submit this additional brief to respond to several points raised for the first time in appellant's reply brief. Appellant's reply brief misstates appellant's position in several respects and contains factual errors. Respondents wish to address these points.

a. Plaintiff's Complaint Fails to Meet the "Stigma-Plus" Test of Paul v. Davis.

Appellant's reply brief cites *Kaprelian v. Texas Women's University*, 509 F.2d 133 (5th Cir. 1975), for the proposition that his "loss of employment" gives rise to a civil rights cause of action. *Kaprelian*, however, predates *Paul v. Davis*, 424 U.S. 693 (1976). The cited language from

Kaprelian does not withstand scrutiny under the subsequent United States Supreme Court decision in *Paul.* Whether through direct quotes of the case or indirectly through cases like *Kaprelian,* plaintiff continues to attempt to support his position with language from *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). However, any language from Constantineau indicating that stigma alone brings due process into play was expressly disapproved in *Paul.*

Under *Paul,* plaintiff is required to show more than stigma to maintain an action for civil rights violation. Plaintiff has maintained that the something more is his loss of employment as a council member. Defendants, however, did not terminate or refuse to hire plaintiff. In his reply brief, plaintiff changes tactics and attempts to argue that the something more is injury to his business reputation. In support of this argument, plaintiff cites *Marrero v. City of Hialeah,* 625 F.2d 499 (5th Cir. 1980). Plaintiff's argument fails for two reasons.

First, and most importantly, plaintiff's proposed second amended complaint does not even allege injury to his business reputation. Plaintiff merely alleges loss of employment, injury to his chances of future election to office, and stigma to his "community reputation" (record p. 234). Plaintiff now attempts to add new allegations to his proposed second amended complaint after demurrers were twice sustained and the ruling affirmed on a motion for reconsideration.

Plaintiff's argument on this point also fails because simple allegations of injury to business reputation are insufficient even under *Marrero. Marrero* found that injury to the "goodwill" of a business was sufficiently tangible

to constitute the "plus" of the Paul "stigma-plus" requirement. 625 F.2d 499, 516 & n.22. The issue of whether injury to business reputation alone is sufficient was left open. *Id.*

Plaintiff next claims that a United States Supreme Court case finding a liberty interest is "strikingly similar" to the present action (reply brief p. 5, citing *Owen v. City of Independence,* 445 U.S. 635 (1980)). Plaintiff, however, ignores language in Owen that distinguishes the present action. In *Owen,* the allegedly defamatory remarks were made "in the course of the *termination of the employment.*" *Id.* As pointed out in respondents' brief, respondents did not terminate or refuse to rehire plaintiff.

Plaintiff's discussion of due process contains misstatements of respondents, arguments. Respondents do not contend that plaintiff failed to allege in his second amended complaint that state law remedies are inadequate. Respondents contend that plaintiff has alleged nothing more than a cause of action for a state law tort – defamation – and has attempted to turn it into a civil rights action.

b. City Attorney Kathe is Entitled to Immunity.

Plaintiff continues to state that he has alleged City Attorney Kathe acted as an investigator. City Attorney Kathe has never denied that he investigated plaintiff's activities. However, the point that plaintiff continues to ignore is that none of the activities allegedly giving rise to his cause of action were investigative. The two actions that plaintiff alleges injured him, reporting his activities to the press and releasing the information to the district

attorney, are closely related to the prosecutorial function. City Attorney Kathe is therefore entitled to absolute immunity under *Imbler v. Pachtman*, 424 U.S. 409 (1976).

c. Defendants Hornbuckle and Roeder are Entitled to Absolute Immunity.

Plaintiff has cited no support for the position that defendants Hornbuckle and Roeder are not entitled to absolute legislative immunity for the acts he alleged injured him. These defendants are entitled to absolute immunity under *Tenney v. Bradhove*, 341 U.S. 367 (1951), and subsequent cases extending legislative immunity to regional and municipal officials.

d. This Appeal Should be Dismissed.

Plaintiff attempts to appeal from the order sustaining the demurrer without leave to amend. Such an order is not appealable. Plaintiff argues that this court should exercise its discretion to deem the order sustaining the demurrer without leave to amend to incorporate an order of dismissal. Defendants request that the court dismiss plaintiff's appeal.

II. CONCLUSION

Appellant's reply brief contains numerous misstatements of fact and law. A close review of the plaintiff's proposed second amended complaint will reveal that plaintiff has failed to state a cause of action for civil rights violation. Plaintiff has failed to identify a federally protected right that was allegedly violated. Plaintiff seeks to disguise a defamation cause of action as a claim for

civil rights violation. Additionally, sound public policy concerns underlie the grant of absolute immunity to all defendants in this action. Neither prosecutors nor legislators should be hampered in making decisions by the threat of civil litigation. The trial court in this action properly found that plaintiff failed to state a cause of action and that defendants were immune from liability. This ruling should be affirmed.

DATED: April 5, 1993

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

In Re: RESPONDENTS' ADDITIONAL BRIEF; 4th Civil No. G013222

Caption: Orville Amburgey vs. City of Costa Mesa, et al.

Filed: IN THE COURT OF APPEAL, Fourth Appellate District, Division Three

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the City and County of Los Angeles; I am over the age of eighteen yeas and not a party to the within action; my business address is: 311 South Spring Street, Suite 200, Los Angeles, California 90013. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Los Angeles, California, addressed as follows:

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APPENDIX C

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Re: Amburgey v. City of Costa Mesa
Case No. G013222

RESPONDENTS' LETTER BRIEF

The court has requested that the parties submit letter briefs addressing the court's intent to dismiss this appeal on the ground that it appeared to be improperly taken from a non-appealable order sustaining a demurrer without leave to amend. Since the respondents received that request, they have learned that the superior court has entered a final order dismissing the action. Respondents respectfully request that the court take judicial notice of this order and incorporate it with the papers related to this appeal. Respondents would also request that the court deem this appeal to have been taken from the order dismissing the action.

Although an order sustaining a demurrer without leave to amend is a non-appealable order, the court has

discretion to deem the appeal taken from a subsequent order dismissing the case. *Edgren v. Regents of University of California* (1984) 158 Cal. App. 3d 515. Such discretion can be exercised in the interests of judicial economy. *Id.* In the present action both appellant and respondents have thoroughly briefed the law of the case. A significant amount of time and effort has been expended by both sides in this appeal. Respondents respectfully request that the court consider the substantial savings to the already overburdened court system that would result if the court were to allow this appeal to proceed.

Appellant's letter brief and a subsequent letter to the Court of Appeal have directed the court's attention to the recent case *Buckley v. Fitzsimmons* (1993) 93 D.A.R. 7962. Appellant, however, has failed to address the relevance, if any, of this case to the present appeal. Because appellant has failed to identify a federal civil right that was allegedly violated by respondent City Attorney Kathe, the *Buckley* decision should have no bearing on this appeal. Even assuming the court reaches the issue of prosecutorial immunity, *Buckley* can be distinguished on the bright line drawn by the Supreme Court; that is, City Attorney Kathe was acting in his prosecutorial capacity because he had probable cause to have appellant arrested. *See Buckley*, 93 D.A.R. at 7965 (stating that a prosecutor is not an advocate until he has probable cause to have someone arrested).

Respectfully submitted,

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APPENDIX D

No. G013222

COURT OF APPEAL – FOURTH DISTRICT
DIVISION THREE
STATE OF CALIFORNIA

ORVILLE AMBURGEY,

Appellant,

vs. No. 66-92-03

CITY OF COSTA MESA, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF
ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE

ANSWER TO PETITION FOR REHEARING

(Filed Dec. 13, 1993)

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TABLE OF CONTENTS

INTRODUCTION 2

DISCUSSION 3

I. FACTS OF THE CASE 3

II. AMBURGEY FAILS TO STATE GROUNDS FOR REHEARING 5

A. THE COURT DID NOT MISSTATE A MATERIAL FACT 5

B. THE COURT DID NOT FAIL TO CONSIDER RELEVANT CASE LAW 6

C. THE COURT DID NOT FAIL TO GIVE ADEQUATE RATIONALE FOR ITS DECISION 9

III. CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Aubry v. Tri-City Hosp. Dist. (1992) 2 Cal.4th 962 9

Buckley v. Fitzsimmons (1993) 113 S.Ct. 2606 .....6, 8

Hendy v. Losse (1991) 54 Cal.3d 723 9

Imbler v. Pachtman (1976) 424 U.S. 409.....6, 8

Lacher v. Superior Court (1991) 230 Cal.App.3d 1038 9

Linhart v. Nelson (1976) 18 Cal.3d 641 7

Matteson v. Wagoner (1905) 147 Cal. 739 9

People v. Rojas (1981) 118 Cal.App.3d 278.....7, 8

Tenney v. Brandhove (1951) 341 U.S. 367..... 6

Statutes

42 U.S.C. §1983.....3, 4

42 U.S.C. §1988.....3, 4

Code of Civil Procedure §472(c)..... 9

Government Code §41803.5 7

Government Code §91001.5 7

Rules

Rules of Court, Rule 27..... 5

Miscellaneous

California Courts of Appeal Internal Operations Practice and Procedures 5

Costa Mesa Municipal Code §1-33 7

Costa Mesa Municipal Code §2-401 7

Costa Mesa Municipal Code §2-408 7

No. G013222

COURT OF APPEAL – FOURTH DISTRICT
DIVISION THREE
STATE OF CALIFORNIA

ORVILLE AMBURGEY,

Appellant,

vs. No. 66-92-03

CITY OF COSTA MESA, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE

ANSWER TO PETITION FOR REHEARING

INTRODUCTION

Petitioner seeks rehearing of the Appellate Court's decision upholding respondents' demurrer to plaintiff and appellant AMBURGEY's complaint for damages. It is petitioner's contention that the Court failed to address key factual issues and legal decisions which petitioner claims establish AMBURGEY's right to maintain his causes of action in this case as a matter of law. (AMBURGEY petition, p.1.) However, petitioner fails entirely to support his contentions and, likewise, fails to appreciate that all factual matters and pertinent legal decisions were considered in detail by the Court of Appeal. Respondents

respectfully submit that AMBURGEY's petition for rehearing is unnecessary, unwarranted, and amounts to a reargument of his opening and reply briefs without due respect for the Court's detailed consideration of all matters herein on appeal. For this reason respondents request that AMBURGEY's petition for rehearing be denied.

DISCUSSION

I.

FACTS OF THE CASE

The gravamen of AMBURGEY's original complaint and first amended complaint was that respondents injured him by reporting apparent criminal violations to the district attorney and the press. The trial court ruled AMBURGEY's causes of action for violation of civil rights under 42 U.S.C. 1983, 1988, failed to allege any violation of a federally protected right. The trial court also ruled that the Costa Mesa city attorney, Kathe, was entitled to absolute immunity from any wrongdoing alleged by AMBURGEY, and that the mayor and city manager were also entitled to absolute legislative immunity. The judgment of the trial court was upheld herein on appeal. (Court's Opinion, p. 17.)

The Court of Appeal specifically held that AMBURGEY failed to state a cause of action under 42 U.S.C. 1983, 1988, because he failed to allege a deprivation of a right, immunity or privilege guaranteed under federal law. (Court's Opinion, p. 6.) The Court found that AMBURGEY's subjective expectancy of continued employment as a council member did not rise to the level of property

interest (an "entitlement" to employment) required to state a cause of action under section 1983. (Court's Opinion, p. 6.) In addition, the Court held that a mere allegation of defamation caused by a governmental official does not give rise to a cause of action for civil rights violations without a showing that the plaintiff was stigmatized and that he was also deprived of a state law right or status. (Court's Opinion, p. 7.) The Court determined that facts plead in AMBURGEY's complaint demonstrated AMBURGEY was merely voted out of office by the voters of the City of Costa Mesa, and no federally protected right was infringed upon.

Once the Court determined AMBURGEY failed to sufficiently plead a cause of action for a federally protected right, the issue of whether the respondent city officials were protected by an absolute immunity, or only a qualified immunity, for the alleged violations becomes irrelevant. Nevertheless, it is this part of the Court of Appeal's opinion that AMBURGEY takes issue with and erroneously states is a viable basis for rehearing.

II.

AMBURGEY FAILS TO STATE GROUNDS FOR REHEARING

Authority to grant a rehearing is conferred by California Rules of Court, Rule 27. A rehearing, however is not an opportunity to reargue the cause and will not be granted absent a substantial error by the Court, the correction of which would likely produce a different result. The Court is likewise vested with broad power to modify

the Court's opinion without grant of a petition for rehearing. (Cal. Cts. of App. Int. Op. Prac. & Pro.) Petitioner AMBURGEY claims a rehearing is warranted on three grounds: that the Court's opinion misstated material facts, that the Court failed to consider relevant case law, and that the Court did not provide an appropriate rationale for its decision. (Appellant's Petition, p. 1-2.) Respondents submit this is patently false.

A. THE COURT DID NOT MISSTATE A MATERIAL FACT.

In his complaint, AMBURGEY alleged that the Costa Mesa city attorney, Kathe, assisted other defendants in producing and forwarding false evidence to the district attorney and to the press regarding alleged criminal misconduct by AMBURGEY and released this falsified information to the press thereafter. (Appellant's Petition, p. 2.) Petitioner claims the Court of Appeal misstated this "material" fact. (Appellant's petition, p. 2, line 12.) However, the Court clearly recognized AMBURGEY's allegation and reiterated it precisely:

> Although Amburgey claims Kathe's investigative activities damaged him, the complaint alleges only that Kathe and others disclosed the results of their investigation to the press and turned over their results to the district attorney. (Court's Opinion, p. 12.)

It is obvious the Court stated AMBURGEY's allegation exactly. Respondents respectfully contend that AMBURGEY has merely attempted to mask his displeasure with the Court's *result* under the guise of an alleged

misstatement of fact. Since the Court did not err, the petitioner has produced no ground for rehearing on this basis.

B. THE COURT DID NOT FAIL TO CONSIDER RELEVANT CASE LAW.

Respondents suggest that AMBURGEY's true objection to the Court's opinion lies in the Court's conclusion that the actions of Kathe, the city attorney, were *not investigative* but were "part and parcel" of the decision by the city attorney to initiate a prosecution as authorized by the Government Code and the Costa Mesa Municipal Code. (Court's Opinion, p.12 relying on *Imbler v. Pachtman* (1976) 424 U.S. 409; Appellant's Petition, p. 2, line 25.)[1] Petitioner erroneously concludes the Court has disregarded the recent decision in *Buckley v. Fitzsimmons* (1993) 113 S.Ct. 2606, in reaching this conclusion. AMBURGEY claims this constitutes grounds for rehearing.

However, AMBURGEY fails to realize the Court's opinion need not address every specific point raised by the parties, so long as the written opinion states the *essential facts* and briefly discusses the *essential legal issues presented.* (*People v. Rojas* (1981) 118 Cal.App.3d 278, 289-290.) The Court may dispose of meritless contentions

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[1] The Court also ruled that Mayor Hornbuckle and City Manager Roeder were absolutely immune from civil liability for any and all acts alleged by plaintiff. (Court's Opinion, p. 14, relying on *Tenney v. Brandhove* (1951) 341 U.S. 367, 379.)

by noting that these points lack sufficient merit to warrant further discussion. (*People v. Rojas, supra*, p. 290; see also *Linhart v. Nelson* (1976) 18 Cal. 3d. 641, 645.) The Court has clearly done so in this case.

The Court specifically recognized that city attorney, Kathe, was authorized by Government Code sections 91001.5 and 41803.5 to prosecute violation of the Political Reform Act and to prosecute misdemeanor violations, and was similarly empowered by the Costa Mesa Municipal Code section 2-401, 2-408, and 1-33 to enforce conflict of interest laws; however, the Court *disputes* that Kathe's actions were "investigative" in nature as plaintiff alleges. The Court clearly states Kathe's actions fell well within his prosecutorial decision making duties and were specifically *not* investigative. (Court's Opinion, p. 13).

The Court further states that although AMBURGEY labeled Kathe's actions "investigative" in his complaint, AMBURGEY "failed to state *facts* sufficient to overcome the absolute immunity" granted the prosecutor. (Court's Opinion, p. 14, fn. 4, emphasis added). The Court then disposed of AMBURGEY's meritless contention by commenting that AMBURGEY's allegation was but a "thinly veiled attempt to disguise a cause of action for malicious prosecution for which a prosecutor is absolutely immune." (Court's Opinion, p.13, fn. 4.)

The Court, therefore, had no obligation to discuss *Buckley* in detail as the *Buckley* decision concerns actions of a state prosecutor absolutely immune from prosecution (consistent with *Imbler v. Pachtman* (1976) 424 U.S. 409, cited by the Court herein) *and* extra-prosecutorial actions

for which the prosecutor is to receive a qualified immunity. (*Buckley, supra.,* 113 S.Ct. 2606.) Since the Court determined AMBURGEY's actions were *not* extra-prosecutorial, further discussion of the *Buckley* decision was not relevant. Again, the Court has no duty to address an issue it considers meritless. (*People v. Rojas, supra,* 18 Cal.App.3d 278, 289-290.)

Further, the Court took great pains to consider the instant issue thoroughly. On July 27, 1993, by letter brief AMBURGEY requested the Court consider the recent decision in *Buckley v. Fitzsimmons, supra,* 113 S.Ct. 2606. On August 4, 1993, respondents responded to AMBURGEY's letter brief, questioning the relevance of the *Buckley* decision and stating respondents' position that *Buckley* was clearly distinguishable. Thereafter, on October 29, 1993, the Court ordered the matter resubmitted for an additional 60 days to allow members of the panel to study the circulating opinion and draft separate opinions should they desire. Notwithstanding the Court's painstaking efforts to study all matters thoroughly, petitioner remains unconvinced the Court did so. However, petitioner's displeasure with the Court's efforts are not grounds for rehearing.

C. THE COURT DID NOT FAIL TO GIVE ADEQUATE RATIONALE FOR ITS DECISION.

As the Court clearly indicates in its Opinion, in ruling on an order sustaining a demurrer without leave to amend, the Court must determine whether the complaint states any cause of action even though the plaintiff's complaint may be intermingled with irrelevant facts or

demands relief to which plaintiff is not entitled. (Court's Opinion, p. 4, citing *Matteson v. Wagoner* (1905) 147 Cal. 739, 742; and *Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1043.) In their seventeen page opinion, the Court has properly analyzed all AMBURGEY's contentions in great detail.

It is the appellant's burden on appeal to have demonstrated that the trial judge abused his discretion in denying leave to amend a complaint. The appellant must also demonstrate how the complaint could have been amended to state a cause of action. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) The requisite showing may be made for the first time on appeal. (California Code of Civil Procedure, Section 472(c); *Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 971.)

AMBURGEY, has, therefore, had ample opportunity to plead viable causes of action in this case, yet he has failed to do so. He may not now request a rehearing in an attempt to get a "second bite out of the apple" before the appellate justices. A rehearing is not an opportunity for a disappointed party to reargue on appeal or to undo mistakes. AMBURGEY by his petition herein has failed not only to identify a substantial error made by the Court of Appeal, but has failed to identify any error at *all* which would warrant a rehearing.

III.

CONCLUSION

For the foregoing reasons, respondents respectfully request AMBURGEY's petition for rehearing be denied.

DATED: December 9, 1993

Respectfully submitted,

LAW OFFICES OF
EDWIN J. RICHARDS & ASSOCIATES

BY: /s/ Edwin J. Richards
EDWIN J. RICHARDS
Attorneys for Defendants and Respondents,
CITY OF COSTA MESA,
THOMAS A. KATHE,
MARY HORNBUCKLE
and ALLAN ROEDER

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 1055 North Main Street, Suite 922, Santa Ana, California 92701.

On December 13, 1993, I served the foregoing document described as:

ANSWER TO PETITION FOR REHEARING

upon the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as described below.

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Santa Ana, California. The envelope was mailed with postage fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed December 13, 1993, at Santa Ana, California.

/s/ Dana L. Dalpiaz
DANA L. DALPIAZ

SEE ATTACHED MAILING LIST

APPENDIX E

S036968
G013222

IN THE
Supreme Court
OF THE STATE OF CALIFORNIA

ORVILLE AMBURGEY,

Plaintiff and Appellant,

vs.

CITY OF COSTA MESA, et al.,

Defendants and Respondents.

ANSWER TO PETITION FOR REVIEW

(Filed Jan. 13, 1949)

AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE

LAW OFFICES OF
EDWIN J. RICHARDS & ASSOCIATES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

LEGAL DISCUSSION – Amburgey does not cite appropriate grounds for Supreme Court review .. 2

A. The issue of whether the City Prosecutor had absolute immunity for information released to the press is not worthy of Supreme Court review 2

B. The issue of whether the prosecutor's acts in furtherance of his role as a prosecutor were "advocatory" or "investigatory" in nature is not worthy of Supreme Court review 6

C. Amburgey's right to maintain his elected council seat is not a federally protected right warranting Supreme Court review 9

CONCLUSION 13

EXHIBIT "A" Order denying the petition for rehearing; Court of Appeal, Fourth Appellate District, Division Three; Filed December 16, 1993 .....

TABLE OF AUTHORITIES

Pages

Cases

Briggs v. Goodwill (D.C. Cir. 1977) 569 F.2d 10..... 3

Buckley v. Fitzsimmons (1993) 113 S.Ct. 2606 .....3, 4, 5, 6, 7, 8

Gardner v. Downtown Porsche Audi (1986) 180 Cal.App.3d 713, 721 6

Imbler v. Pachtman (1976) 424 U.S. 409 ..... 3, 7, 12

Jones v. Hopper (10th Cir. 1969) 410 F.2d 1323, 1329 10

Paul v. Davis (1976) 424 U.S. 693 .....10, 12

People v. Davis (1905) 147 Cal. 346, 348..... 1

Willis v. Santa Ana Hosp. (1962) 58 Cal 2d. 806..11, 12

Statutes

28 U.S.C. 1983..... 4

42 U.S.C. 1983 or 1988.....4, 9

California Government Code Section 34883..... 11

Government Code Section 91001.5..... 8

Costa Mesa Municipal Code Sections 2-401 and 2-408..... 8

Rules

California Rules of Court Rule 29..... 2

Other Authorities

Political Reform Act, Section 41803.5 8

Superior Court Prac. & Pro. (1990 Rev.) Sec. 1, P. 1 1

IN THE

SUPREME COURT OF CALIFORNIA

ORVILLE AMBURGEY, Plaintiff/Appellant, vs. CITY OF COSTA MESA, ET AL., Defendants/ Respondents.	NO _____ Court of Appeal: 4CIV G013222 Orange County Superior Court No. 669203 RESPONDENTS' ANSWER TO PETITION FOR REVIEW

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant and respondent CITY OF COSTA MESA hereby answers plaintiff/appellant's Petition for Review as follows:

INTRODUCTION

The very nature of California Supreme Court review is to decide important legal questions and maintain statewide harmony and uniformity of decision. The supreme courts' focus is not on correction of error by the court of appeal in a specific case. *People v. Davis* (1905) 147 Cal. 346, 348; Sup. Ct. Prac. & Pro. (1990 Rev.) sec. 1, p. 1.)

The grounds for supreme court review as prescribed by *California Rules of Court*, Rule 29, reflect the narrow scope of supreme court review of an appellate decision:

> "Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges." (Cal.Rules Ct., Rule 29.)

Appellant's petition for review herein purports to present issues worthy of supreme court review; however, the actual substance of the issues presented do not demonstrate the existence of appropriate grounds for granting review.

LEGAL DISCUSSION

I.

AMBURGEY DOES NOT CITE APPROPRIATE GROUNDS FOR SUPREME COURT REVIEW

A. The Issue of Whether the City Prosecutor had Absolute Immunity for Information Released to the Press is not Worthy of Supreme Court Review.

Petitioner's primary issue presented for review is whether a prosecutor has absolute immunity when issuing press releases. (Pet.Rev., p. 5.); however, petitioner fails entirely to demonstrate why review of this issue is necessary to secure uniformity of decisions in California,

or why this is a question of law necessitating immediate consideration by the California Supreme Court.

In fact, petitioner admits "there have been *no* California Court decisions dealing with the issue of prosecutorial immunity at press conferences." (Pet.Rev, p. 6, emphasis added.) Where no decisions exist, there can, necessarily, be no conflict of decisions worthy of review.

Further, petitioner correctly states California decisions addressing prosecutorial immunity have based their rationale on the United States Supreme Court case of *Imbler v. Pachtman* (1976) 424 U.S. 409 and the D.C. circuit court case of *Briggs v. Goodwill* (D.C. Cir. 1977) 569 F.2d 10.

Petitioner thereafter contends that after the U.S. Supreme Court decision in *Buckley v. Fitzsimmons* (1993) 113 S.Ct. 2606, "California law is unclear" as to whether a prosecutor is absolutely immune when issuing press releases. (Pet.Rev., p. 7.) However, petitioner's contention is entirely without merit as the *Buckley* decision did not overrule the U.S. Supreme Court case of *Imbler* nor did it overrule *Briggs*. The *Buckley* decision merely clarified a specific area of law addressing prosecutorial immunity where alleged wrongful conduct of a prosecutor resulted in a recognized profound and egregious violation of a federally protected right to liberty.

Petitioner's apparent confusion on the issue of prosecutorial immunity in this context hinges on petitioner's failure to appreciate that the true issue in the case herein on appeal is whether AMBURGEY's complaint and first amended complaint alleged sufficient facts to constitute *any* violation of a federally protected right pursuant to 42

U.S.C. 1983, or 1988, and only secondarily, whether city officials were protected by an absolute immunity for acts allegedly causing the deprivation of a federally protected right.

The Court of Appeal specifically held that AMBURGEY's complaint *failed* to state *any* cause of action under 42 U.S.C. 1983, or 1988. AMBURGEY failed to adequately allege deprivation of any right, immunity or privilege guaranteed under federal law. (Court's Opinion, attached hereto as Exhibit "A," p. 6.) Without first establishing the violation of a federally protected right, the issue of whether governmental officials should be granted absolute or partial immunity for acts allegedly leading to a deprivation of a civil right becomes irrelevant, moot, and purely academic. It is not the function of the supreme court to entertain issues in review that are not critical questions of law or invite speculation on the law. Nevertheless, by the presentation of his primary issue for review, petitioner persists in his quest to have the high court do just that.

It is important to note that the *Buckley* decision made a preliminary critical assumption that cannot be made in the case at bar: that a constitutional violation *had* occurred for which 28 U.S.C. 1983 provides a remedy. In *Buckley,* Buckley commenced his action after being incarcerated for three years with a loss of liberty – a clearly protected right. He alleged that the incarceration was a result of the false and defaming statements made by the prosecutor. There are no such facts in the case at bar, and the Court of Appeal correctly found that AMBURGEY failed to allege any deprivation of a right, immunity or

privilege guaranteed under the federal law. (Court's Opinion).

It is also important to note that in *Buckley* the complaint alleged that the prosecutors fabricated false evidence and made false statements for the purpose of securing the *prosecutors* reelection. Based upon that finding, the Court concluded that the statements by the prosecutors were made exclusively for personal gain of the prosecutors, i.e., their reelection. (Buckley v Fitzsimmons, *supra*, 113 S.Ct. 2606.) There was no such ulterior motive in AMBURGEY because it was Amburgey who was standing for reelection, not the prosecutor. The Court of Appeal correctly concluded that the city attorney's disclosure of the results of his investigation to the press fell well within his duties as a prosecutor and was intimately associated with his duty to initiate a prosecution as authorized by the Government Code and the Costa Mesa Municipal Code. (Ct. Opin., p.12).

Based upon the above it is clear that the facts of the *Buckley* case are clearly distinguishable from the facts in *AMBURGEY.*

The Court of Appeal was fully cognizant of the *Buckley* decision. It was brought to the Court's attention on two occasions: by petitioner's letter brief on July 27, 1993, and again by petitioner's motion for rehearing which was denied by the Court of Appeal on December 16, 1993. (Court of Appeal order attached hereto as Exhibit "A".) The Court of Appeal is vested with the discretion to modify any opinion to correct their opinion where warranted. (*Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713, 721.) The Court of Appeal, however,

made no modification to its opinion whatsoever. Petitioner, has therefore, presented absolutely no compelling reason why the California Supreme Court should grant review based on this issue.

B. The Issue of Whether the Prosecutors Acts in Furtherance of his Role as a Prosecutor were "advocatory" or "investigatory" in Nature is not worthy of Supreme Court Review.

The second issue petitioner raises that allegedly warrants supreme court review again arises out of the *Buckley* decision. Petitioner erroneously contends the issue of what constitutes acts of "investigation" by a prosecutor and acts of advocacy for which the prosecutor would be absolutely immune requires supreme court review. (Pet.Rev., p. 6.) In the context of the instant case, it is petitioner's contention that

> "after *Buckley*, California law is unclear as to whether a city attorney's acts of interviewing witnesses, reviewing city documents, records and minutes, and taking statements from witnesses constitute investigative acts or initiation of prosecution." (Pet.Rev., p. 9.)

Once again, petitioner admits, "there are no California cases that address these issues," (Pet.Rev., p. 6.), hence, again, there can be no conflict in case law worthy of supreme court review to insure uniformity of case law on this issue.

Further, resolution of the issue of what constitutes an act of investigation versus an act of advocacy by a prosecutor does not address an issue of vital public policy or

involve a matter significantly affecting the administration of justice within the state of California, particularly since a long line of U.S. supreme court cases has addressed this very issue and set forth well delineated criteria for the same. (see *Imbler v. Pachtman* (1976) 424 U.S. 409.)

> In *Imbler v. Pachtman, supra,* 424 U.S. 409, the U.S. Supreme Court specifically held that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom . . . " (*Imbler v. Pachtman, supra.,* 424. U.S. 409, 434.)

All of these acts are entitled to absolute immunity as they are all fairly within the prosecutor's function as an advocate. (*Imbler v. Pachtman, supra,* 424 U.S. 409, 431, fn. 33, 430, fn. 32.) This concept was again, reiterated and acknowledged in the *Buckley* decision itself. (*Buckley v. Fitzsimmons, supra,* 113, S.Ct. 2606.)

The court in *Buckley* specifically stated:

> "We have not retreated . . . from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." (*Buckley v. Fitzsimmons supra,* 113, S.Ct. 2606.)

Herein, the Court of Appeal determined that the acts of the city attorney, Kathe, as plead in AMBURGEY's complaint were not investigatory and justified the grant of absolute immunity. The Court of Appeals determined Government Code section 91001.5 granted the city attorney the power to prosecute violations of the Political

Reform act; section 41803.5 authorized him to prosecute misdemeanor violations which occur in his city, and the Costs Mesa Municipal Code sections 2-401 and 2-408, empowered the city attorney to prosecute criminal violations of any conflict of interest provisions of the Government Code. (Ct. Opinion, pp.11-12.) In fact, the Court of Appeal determined *the very allegations of AMBURGEY's own complaint compelled the conclusion that city attorney Kathe was acting solely as a prosecutor, and not as an investigator.* (Ct. Opinion. p.12.)

Therefore, petitioner's urging that the supreme court should decide the *factual issue* of whether the city attorney's interview of witnesses, reviewing city documents, records and minutes and taking statements from witnesses constituted advocacy or investigation is clearly misplaced. Issues of fact are to be determined by the Court of Appeal, which they have clearly done in this case.

C. AMBURGEY's Right to Maintain his Elected Council Seat is not a Federally Protected Right Warranting Supreme Court Review.

Lastly, petitioner requests the supreme court grant review of the issue of whether "a city councilman running for election, had a federally protected right to be free from the stigma of false accusation of criminal conduct." (Pet.Rev. p.6).

This final issue also does not in any manner demonstrate a significant conflict of state law on the issue, nor does it warrant review by the California Supreme Court based on an issue of vital public policy or an issue

significantly affecting the administration of justice in the state.

The issue petitioner presents has been clearly addressed and discussed at length by the Court of Appeal on the basis of long standing federal law. The Court of Appeal clearly stated that AMBURGEY failed to state a cause of action under 42 U.S.C. 1983, or 1988, because he failed to allege a deprivation of a right, immunity or privilege guaranteed under federal law. (Court's Opin. p.6.) The Court of Appeal determined that AMBURGEY's subjective expectancy of continued employment as a council member did not rise to the level of a property interest (an "entitlement" to employment) required to state a cause of action under federal law. (Court's Opin., p.6.) In addition, the Court of Appeal held that a mere allegation of defamation caused by a governmental official does not give rise to a cause of action for civil rights violations without a showing that the plaintiff was stigmatized and that he was also deprived a state law, right, or status. (Court's Opin.p. 7.)

Petitioner erroneously states, without cited authority, that his reputation is "federally protected right." (Pet. Rev. p. 10). Clearly, this is not the case. In *Paul v. Davis* (1976) 424 U.S. 693, the U.S. Supreme Court held that a plaintiff could *not* bring suit for an alleged violation of a constitution right where there was an absence of governmental action which deprived the plaintiff of a right held under state law.

In *Paul,* a local police chief distributed flier to local merchants showing plaintiff's photo and (falsely) labeled plaintiff as an active shoplifter. The Court found that

reputation alone was not a constitutionally protected "liberty" or "property" interest. (*Paul v. Davis, supra,* 424 U.S. 693.) In *Paul v. Davis, supra,* 424 U.S. 693, the shoplifting flier, although potentially detrimental to plaintiff's reputation, did not alter a pre-existing state right.

In AMBURGEY's case, the Court of Appeal correctly held that a mere subjective expectancy of reelection and continued employment does not give rise to a property interest for purposes of the due process clause under 42 U.S.C. 1983. (*Jones v. Hopper* (10th Cir. 1969) 410 F.2d 1323, 1329.) An employee must have an "entitlement" to employment before it can be said that he has a protected property interest therein. Certainly, AMBURGEY was not entitled to maintain council seat as evidenced by the pending election to replace or renew council members at the discretion of the citizens of Costa Mesa.

Despite AMBURGEY's protestations that Cal.Gov.Code section 34883 et seq. "recognizes employment, reputation, business goodwill, and the right to hold elected office" as significant property interests (Pet.Rev., p. 10), the statutes he cites and the case cited in support of this contention, *Willis v. Santa Ana Hosp.* (1962) 58 Cal 2d. 806, do *not* stand for the proposition that a city councilman has a significant property interest in the right to hold an elected office. Much to the contrary, in *Willis v Santa Ana Hosp. supra,* 58 Cal.2d 806, the court urged a balancing test weighing the rights of the plaintiff against public interest and did not in any manner address the rights of a city official, nor an elected office.

Willis involved a private osteopathic physician deprived of hospital privileges as a result of a conspiracy

contrived by other doctors which was designed to restrain competition and deprive Willis of his practice in order to benefit competing members of the conspiracy. (*Willis v. Santa Ana Hosp, supra,* 58 Cal. 2d 806, 810.) The court held that an action will lie at common law in California where a right to pursue an occupation or trade is intentionally interfered without sufficient justification. This must be determined in light of all circumstances, the respective importance to society, and the importance of protecting the activity interfered with. (*Willis v. Santa Ana Hosp, supra,* 58 Cal. 2d. 806, 810.)

Certainly, AMBURGEY cannot credibly maintain that the U.S. Supreme Court rulings in *Imbler v. Pachtman* (1976) 424 U.S. 409, which emphasizes the strong public policy mandating absolute immunity from civil liability for a public prosecutor is superseded by the decision in *Willis v. Santa Ana Hosp. supra,* 58 Cal. 2d 806.

As the U.S. Supreme Court emphasized in *Paul v. Davis, supra,* 424 U.S. 793, 600-701, damage to reputation without more, does not rise to the level of a constitutional violation. (*Id.,* pp. 702-711.) Here, as in *Paul,* absolutely no governmental action deprived AMBURGEY of a right held under state law or extinguished that right.

Simply put, AMBURGEY continues to pursue creation of a federal civil rights issue herein by reasserting a tenuous link between the "stigma" he claims he suffered and the loss of his city council seat. The Court of Appeals was clear that AMBURGEY was not deprived of a right granted by state law by governmental intervention. AMBURGEY, therefore, seeks herein, review of an issue with no basis in law.

CONCLUSION

Respondents respectfully submit that none of the issues raised in AMBURGEY's Petition for Review support a valid basis for Supreme Court review. Wherefore, respondents respectfully request that AMBURGEY's petition for review be denied.

Respectfully submitted,

EDWIN J. RICHARDS &
ASSOCIATES

By /s/ Edwin J. Richards
Edwin J. Richards
Attorneys for
Respondents

EXHIBIT "A"

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
Division Three

AMBURGEY, ORVILLE

v.

THE CITY OF COSTA MESA

(Filed Dec. 16, 1993)

G013222
Orange County No. 669203

THE COURT:

The petition for rehearing is DENIED.

H. MOORE, J.
Acting Presiding Justice

We Concur:

WALLIN, J.
Justice

CROSBY, J.
Justice

cc: Orange County Clerk
All Counsel

PROOF OF SERVICE BY MAIL

In Re: ANSWER TO PETITION FOR REVIEW; No. S036968
Caption: Orville Amburgey vs. City of Costa Mesa, et al.
Filed: IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 311 South Spring Street, Suite 200, Los Angeles, California 90013. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Los Angeles, California, addressed as follows:

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3403 Tenth Street, Suite 700
Riverside, CA 92501 (Attorneys for Plaintiff and Appellant)

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GARY L. GRANVILLE, COUNTY CLERK
Orange County Superior Court
For: Hon. Randall Wilkinson, Judge
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Santa Ana, CA 92702

CLERK, COURT OF APPEAL
Fourth Appellate District
Division Three
925 North Spurgeon Street
Santa Ana, CA 92701

I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on January 13, 1994 at Los Angeles, California.

/s/ Donald Johnson D.JOHNSON

APPENDIX F

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

42 U.S.C. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. 1988. Proceedings in vindication of civil rights; attorney's fees; expert fees

(a) Applicability of statutory and common law.

The jurisdiction in civil and criminal matters conferred on the district courts, by the provisions of this Title, and the Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections, 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fees.

California Government Code § 815.2

§ 815.2. Injuries by employee within scope of employment; immunity of employee

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

California Government Code § **41801. Legal advise**

The city attorney shall advise the city officials in all legal matters pertaining to city business.

***California Government Code* § 41805. Representation of defendants in criminal matters; conditions; private practice by attorney employee of city**

(a) No city attorney who does not, in fact, exercise prosecutorial responsibilities on behalf of the city or cities by which he is employed shall be precluded from defending or assisting in the defense of, or acting as counsel for, any person accused of any crime except for violation of any ordinance of the city or cities by which he is employed, provided that:

(1) The city or cities by which he is employed expressly relieve him of any and all prosecutorial responsibilities on its or their behalf; and

(2) The accused has been informed of and expressly waives any rights created as a result of any potential conflict created by his attorney's position as a city attorney.

(b) Where the above provisions are met, no partner or associate of a city attorney shall be prevented from defending or assisting in the defense of, or acting as counsel for, any person accused of any crime except for violations of any ordinance of the city or cities by which his partner or associate is employed as a city attorney.

This section shall not preclude any city from limiting or prohibiting the private practice of any attorney it retains or employs.

***California Government Code* § 87100. Public officials; state and local; financial interest**

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

***California Government Code* § 87103. Financial interest in decision by official**

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official of a member of his or her immediate family or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars ($1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor or, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars ($250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

***California Government Code* § 91000. Violations; fined; limitations**

(a) Any person who knowingly or willfully violates any provision of this title is guilty of a misdemeanor.

(b) In addition to other penalties provided by law, a fine of up to the greater of ten thousand dollars ($10,000) or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received may be imposed upon conviction for each violations.

(c) Prosecution for violation of this title must be commenced within four years after the date on which the violation occurred.

Costa Mesa Municipal Code § 2-401. Purpose.

Pursuant to the provisions of Government Code section 87300 et seq., the City of Costa Mesa hereby adopts the following conflict of interest code. Nothing contained herein is intended to modify or abridge the provision of the "Political Reform Act of 1974" (Government Code section 8100). The provisions of this code are additional to Government Code section 87100 and other laws pertaining to conflicts of interest. Except as otherwise indicated, the definitions of said act and regulations adopted pursuant thereto are incorporated herein, and this code shall be interpreted in a manner consistent therewith. (Ord. No. 77-46, § 2, 9-6-77)

Costa Mesa Municipal Code § 2-408. Definition of terms.

Except as otherwise provided, the definitions contained in the Political Reform Act of 1974 (Government Code section 81000, et seq.), the regulations of the fair political practices commission, and any amendments to the act or regulations, shall be incorporated into this conflict of interest code. (Ord. No. 77-46, § 2, 9-6-77)

Costa Mesa Municipal Code § 1-33. Violations, penalties and enforcement.

The city council of the City of Costa Mesa intends to secure compliance with the provisions of this Code. To the extent that such compliance may be achieved by less drastic methods of enforcement the following alternate, separate and distinct methods may be utilized. Each

method set forth herein is intended to be mutually exclusive and does not prevent concurrent or consecutive, methods being used to achieve compliance against continuing violations. Each and every day any such violations exist constitutes a separate offense.

Notwithstanding any other provision of this Code, each violation of the provisions of this Code may be enforced alternatively as follows:

(a) Infraction. any person violating any of the provisions or failing to comply with any of the mandatory requirements of this Code may be prosecuted for an infraction. Written citations for infractions may be issued by police officers or designated nonsafety employees, who shall be designated by separate resolution pursuant to the provisions of California Penal Code Section 836.5. Any person convicted of an infraction under the provisions of this Code shall be punishable either by fines as is specified in the currently adopted Uniform Infraction Bail Schedule used by the Orange County Municipal Courts, or where no fine is specified therein by:

(1) A fine not exceeding one hundred dollars ($100.00) for a first violation;

(2) A fine not exceeding two hundred dollars ($200.00) for a second violation of the same ordinance within one year;

(3) A fine not exceeding five hundred dollars ($500.00) for each additional violation of the same ordinance within one year.

(b) Misdemeanor. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of this Code may be prosecuted for a misdemeanor. Written citations for misdemeanors may be issued by police officers or by designated nonsafety employees, who shall be designated by separate resolution pursuant to the provisions of California Penal Code Section 836.5. Any person convicted of a misdemeanor under the provisions of this Code shall be punished by a fine not exceeding one thousand dollars ($1,000.00) or imprisonment for a term not exceeding six (6) months, or by both such fine and imprisonment.

(c) Civil action. The city attorney, by and at the request of the city council, may institute an action in any court of competent jurisdiction to restrain, enjoin or abate the condition(s) found to be in violation of the provisions of this Code, as provided by law.

(d) Administrative hearing. Upon a finding by the city official invested with the authority to enforce the various provisions of this Code that a violation exists, he may notify the owner(s), occupant(s) or person(s) deemed responsible for said violation(s) that a public hearing shall be held before the city council to hear and determine the existence of said violation(s) and the anticipated compliance necessary, i.e. abatement or other action required.

Said notification shall be in writing setting forth the alleged violation(s) and the anticipated action sought, and shall be given not later than ten (10) days prior to the scheduled date of the hearing. Said hearing shall be conducted in accordance with the city council's rules for the conduct of an administrative hearing. The decision of said hearing shall be enforceable as provided by law. (Code 1960, § 1115; Ord. No. 79-3, § 2, 4-2-99; Ord. No. 85-26, § 2, 10-21-85)